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**AMERICAN JURIST,**

AND

**LAW MAGAZINE**

**FROM APRIL 1838 TO JANUARY 1843:**

**DURING WHICH PERIOD IT WAS CONDUCTED AND PRINCIPALLY EDITED**

**By LUTHER S. CUSHING.**

**IN TEN VOLUMES.**

**VOL. II.**

Containing Numbers 39 and 40, for October 1838, and January 1839,  
being Volume **XX.** of the entire Collection.

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**1843**

BOSTON:  
PRINTED BY FREEMAN AND BOLLES,  
WASHINGTON STREET.

MAY 6 1868

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# AMERICAN JURIST.

NO. XXXIX.

OCTOBER, 1838.

## ART. I.—LAW OF CONTRACTS.

No. 1.—*Of the definition and division of contracts; and of the assent of the parties thereto.*

THE most concise definition of a contract, to be found in the books, is that given by the late chief justice Marshall, in the case of *Sturges v. Crowninshield*:<sup>1</sup> “A contract is an agreement, in which a party undertakes to do, or not to do, a particular thing.”<sup>2</sup> Blackstone’s definition is—“an agreement, upon sufficient consideration, to do, or not to do, a particular thing.”<sup>3</sup> Most other writers not only include the consideration of a contract in its definition, but also term it a covenant or bargain between two or more parties.<sup>4</sup> As, however, the word contract, agreement, or bargain, *ex vi*

<sup>1</sup> 4 Wheaton, 197.

<sup>2</sup> The same learned judge used nearly the same language, in defining an executory contract, in the case of *Fletcher v. Peck* (6 Cranch, 136): “An executory contract is one in which a party binds himself to do, or not to do, a particular thing.”

<sup>3</sup> 2 Black. Comm. 446. Gifts, by the common law, are not regarded as contracts. 2 Kent’s Comm. 353 (1st ed.)

<sup>4</sup> See *Termes de la Ley*. *Jacob’s Law Dictionary*. *Powell on Contracts*, (Introd.) &c.

*termini*, imports more than one party, it is slovenly tautology, in a professed definition, to speak of an agreement "between two or more parties." It is like defining a *feme covert*, by calling her a woman married to a husband, instead of simply denominating her a married woman.

The word "covenant," used in many definitions given of a contract, is objectionable. Strictly and technically taken,—as all words, employed in a definition of a subject of science, should be,—a covenant is a contract under seal; and is therefore improperly adopted in reference to contracts generically, because it embraces only one specific class of contracts.

The word "agreement" is most generally used in the older books, to denote what is now more usually termed a contract. The introduction of Contract into the titles of the common law is of modern date. Agreement is "the union of two or more minds in a thing done or to be done."<sup>1</sup> In the language of some of the old writers, it is called "a coupling or knitting together of minds."<sup>2</sup> In the case of *Wain v. Warlters*,<sup>3</sup> the court of King's Bench held, that in a strict, technical sense, the word agreement signifies a contract on consideration. If this notion be correct, Blackstone's definition of a contract is tautological, and Marshall's should therefore be preferred. This technical import, however, of the word agreement, though adopted in New York, New Hampshire and South Carolina, is denied by the supreme courts of Connecticut, Massachusetts, and Maine; and, to say the least, is a very questionable point.<sup>4</sup>

Assuming that the word agreement does not import a

<sup>1</sup> Plowd. 17; Comyns' Digest, Agreement, A. We discard the alleged etymology—"aggregatio mentium."

<sup>2</sup> Shep. Epit.

<sup>3</sup> 5 East, 10.

<sup>4</sup> See a note to *Wain v. Warlters* (5 East, 20, Day's Ed.), prepared by the late chief justice Swift, of Connecticut;—also *Packard v. Richardson*, 17 Mass. 122; *Levy v. Merrill*, 4 Greenleaf, 189; *King v. Upton*, ib. 389; *Sage v. Wilcox*, 6 Connect. 81; Revised Statutes of Massachusetts, c. 74, § 2.

contract on consideration—is Blackstone's definition, or Marshall's, the most accurate? Both these definitions, as well as those of the other writers just cited, include all contracts,—the whole genus,—whether of record, under seal, or by parol,—recognizances, grants of land, bonds, promissory notes, or mere oral promises. To the validity of a simple contract (one not under seal) a legal and sufficient consideration is, by the common law, indispensable. But a contract by specialty (or under seal) is valid without consideration; or, which for the present purpose amounts to the same thing, it imports a consideration, which the party is estopped to deny.<sup>1</sup> *A fortiori*, is this true of contracts of record. Blackstone's definition, therefore, embraces all simple contracts, and, as to them, is accurate. But as to those contracts, which are valid without a consideration, or import a consideration not to be denied, it is not accurate. Marshall's definition covers this latter class of contracts, and would seem to be sufficiently correct as to the former. For in defining a contract, or any thing else, generically, it is not merely unnecessary, but is illogical and improper, to include all the incidents and qualities that appertain to the subject.

Some contracts are required to be written; others need not be reduced to writing. Some require a consideration, or a seal, to support them; others do not. In a general definition; therefore, it is not perceived, why a consideration, which forms a constituent part of only one species of contracts, should be included, in order to render it complete. Why should not writing, and sealing, which are essential to

<sup>1</sup> "A consideration is necessary to the validity of all contracts and agreements *not under seal*," &c.; 2 Kent's Comm. (1st ed.) 365; 1 Comyn on Contracts, 13. See also Plowd. 308. "A mere voluntary bond, given without any consideration, is good." "A mere want of consideration is not sufficient to avoid a bond." By Parker and Sewall, Js. 2 Mass. 161, 162: By Lord Kenyon, 7 D. & E. 477: By Sir J. Jekyll, 3 P. W. 222.

the validity of certain species of contracts, be also included with equal reason?

The genus not only admits, but requires, a different definition from that which is proper for the several species. A simple contract has its appropriate definition; and, in that definition, a consideration is to be included. Blackstone has defined it with brevity and clearness, in his attempt to define contracts generally. A contract by specialty requires a different definition. And a contract, in its broad generic sense, is to be defined differently from either of its species; and this has been done, with singular precision and exactness, in the words first quoted from the late chief justice of the United States.<sup>1</sup>

Contracts may be divided into three classes, namely; 1. Simple contracts, or contracts by parol; 2. Specialties, or contracts under seal; and, 3. Contracts of record.

All contracts, not of record, are distinguished by the common law into agreements by specialty, and agreements by parol. There is no such third class as contracts in writing. If they be merely written and not specialties, they are parol.<sup>2</sup> The rules of evidence are not the same, when applied to written and unwritten contracts; and, in the discussion of a question of evidence, the late chief justice Parker (of Massachusetts) says,<sup>3</sup>—"There are three classes of contracts, viz.: specialties,—written contracts, not under seal,—and parol or verbal contracts." So far as this remark relates to the immediate point before the court, it is doubtless correct; but it is unfortunately expressed, and, as it regards the artificial classification of contracts, is at variance with all approved authority.

<sup>1</sup> It is a maxim of the ancient sages of the law, that legal definitions are hazardous: *Omnis definitio in lege periculosa.*

<sup>2</sup> 7 Durnf. & East, 351 (note), *Rann v. Hughes*; 3 Johns. Cas. 65, *Ballard v. Walker*; 6 Halsted, 174, *Perrine v. Cheeseman*.

<sup>3</sup> 11 Mass. 30, *Stackpole v. Arnold*.

In this and several succeeding articles, which we propose to publish on the Law of Contracts, our attention will be directed chiefly to the second kind of contracts above-mentioned, namely, simple contracts, which, embracing as they do, a great part of the business of every man's life, and furnishing a large proportion of all the cases litigated in our courts, constitute a very important branch of the law. Many of the principles, however, which govern this division of contracts, are equally applicable to the others. But before proceeding to state the principles, which belong strictly to the law of contracts, it will be useful to take notice of two distinctions constantly recurring in the books, between *express* and *implied* contracts,—and *executory* and *executed* contracts.

The first of these distinctions obtains chiefly, though not exclusively, in simple contracts. An *express* contract is one which is actually and formally made, wherein the parties stipulate in positive terms what is to be done or omitted. An *implied* contract is not thus actually and formally made, but is inferred from the conduct, situation, or mutual relations of the parties, and enforced by the law on the ground of justice, or to compel the performance of a legal and moral duty: <sup>1</sup> as, where one man sends to the shop of another for articles of food or clothing,—or employs another to labor for him or to render him other services,—or, where a guest enters an inn and takes refreshment or lodging. In these and numberless similar cases, though nothing is stipulated concerning price or payment, the law is said to imply a contract and a promise to pay a reasonable sum for the articles, refreshments, or services received.<sup>2</sup> So, if a man

<sup>1</sup> "A great mass of human transactions depends upon implied contracts; upon contracts which are not written, but which grow out of the acts of the parties. In such cases, the parties are supposed to have made those stipulations, which, as honest, fair and just men, they ought to have made." By Marshall, C. J., 12 Wheaton, 341.

<sup>2</sup> Finch, 181.

has another's money, which in equity and good conscience he ought to restore, the law is said to imply a promise to restore it.<sup>1</sup> So, too, if a man undertakes any trust, office or employment, the law raises a promise on his part, to perform his undertaking with integrity, diligence and skill; and, if he injure his employer by a want of either of these qualities, he is liable to an action on his implied contract, for reparation.<sup>2</sup>

There are also certain positive obligations imposed by law, where there is no antecedent moral duty; and, here, in many instances, a contract or promise is inferred to fulfil those obligations.<sup>3</sup> Thus, in some of the states, taxes may be collected by suit, on a promise implied by law to pay the collector. In Massachusetts, and in some of the other states, towns are under an obligation imposed by statute, to relieve and support poor persons, and to reimburse expenses incurred by other towns, in furnishing such relief to those who have fallen into distress, where they have not a legal settlement; and may be compelled, in an action on an implied promise, to reimburse such expenses to other towns, and to individuals of their own body.<sup>4</sup>

It is a general rule, that a contract shall not be implied, where an express one is made: *Expressum facit cessare tacitum.*<sup>5</sup> Thus, where one became surety for his neighbor

<sup>1</sup> 17 Mass. 563.

<sup>2</sup> 1 Comyn on Contracts, 6.

<sup>3</sup> Mr. Hammond, in his treatise on Parties to Actions, pp. 4 and 14, makes a third species, viz., contracts created by law, where there is no express or tacit agreement.

<sup>4</sup> In the civil law, those contracts which correspond to the implied contracts of the common law, are denominated *obligationes quasi ex contractu*, and Heineccius denies that they are founded on contract. (El. Jur. sec. ord. Inst. lib. iii. tit. 14, 28. Dictata, ib.; Recitationes, ib.) Most civilians, however, like the common lawyers, derive them *ex consensu factio vel præsumpto*. Vinius, in his commentary on the Institutes, denies it. (Lib. iii. tit. 28).

<sup>5</sup> 2 Durnf. & E. 105, Toussaint v. Martinnant; 7 Mass. 107, Whiting v. Sullivan; 7 D. & E. 384, by Lord Kenyon; 11 Mass. 553; 2 Maule & Selwyn, 316; 4 Wash. C. C. Rep. 185, Trask v. Duvall.

for money borrowed of a third person, and took a bond of indemnity from the principal debtor, and, on being compelled to pay the money, brought an action against the principal on the implied promise, which the law raises in such cases, to reimburse the surety, it was held, that as he had taken a bond, which was an express contract, he must resort to that alone, for indemnity.<sup>1</sup> So, where the hirer of a vessel, under a charter-party, in which the owner covenanted that the vessel should be tight, strong, &c., sued the owner, on an implied contract, for reimbursement of expenses incurred for necessary repairs made during the voyage, it was held, that the only remedy was on the covenant expressed in the charter party.<sup>2</sup>

In both these cases, the express contract was under seal, and the remedy thereon was an action of debt or covenant; whereas the remedy usually adopted, in cases of implied contract, is the action of assumpsit; and, it is a legal maxim, that the law will not raise an assumpsit, where the party resorts to a higher security. This, however, is not the ground on which the first mentioned case was decided. The court proceeded on the principle (as expressed by Buller), that " promises in law exist only where there is no express stipulation between the parties."

In other cases, where the express promise was of the same, and not a higher nature than an implied one, the same doctrine has been constantly applied. Thus, a plaintiff cannot recover on an implied contract for goods delivered, when there is an existing express contract, in part performance of which the goods were delivered.<sup>3</sup> Indeed, it is a familiar rule, that while an express contract is still open, a party cannot resort to an implied contract.<sup>4</sup>

<sup>1</sup> 2 D. & E. 100.      <sup>2</sup> 10 Mass. Rep. 192, *Kimball v. Tucker & others.*

<sup>3</sup> 19 Johns. 205, *Wood v. Edwards.* See also 3 Binney, 126, *Duncan v. Kieffer*; 18 Johns. 456, *Robertson v. Lynch.*

<sup>4</sup> Buller's N. P. 139; 2 Stark. on Ev. 95, n. (2); Doug. 23; 2 East, 145.

To this rule, that promises in law (as implied promises are often called) do not exist where there are express stipulations, there are some exceptions: for example, if the terms of an express agreement have been performed, so as to leave a mere simple debt or duty between the parties, the plaintiff may recover on the implied contract;<sup>1</sup> so, where an express promise contains nothing more than the law will imply, an action may be sustained on the implied promise;<sup>2</sup> when both parties have departed from the special agreement, the law will raise an implied one;<sup>3</sup> where an express contract is void, on account of illegal consideration, a promise may be implied to pay what was justly due, before the illegal agreement was made;<sup>4</sup> and so, in an action for money had and received, or money lent, a promissory note (which is an express promise) may be given in evidence to prove the declaration.<sup>5</sup>

<sup>1</sup> *Fitzgibbon*, 303, *Gordon v. Martin*. This is one of the earliest cases on the subject, and was thus:—The defendant wrote to the plaintiff, requesting him to perform certain services, and promising to pay him therefor, on performance. Instead of suing the defendant on the special promise, and setting it forth in the declaration, the plaintiff sued him in general indebitatus assumpsit, for services rendered at his request, and the action was sustained. This is now a very usual course. 2 *Marsh.* 275, *Grey v. Gower*; 7 *Cranch*, 299.

<sup>2</sup> 1 *Pick.* 119, *Gibbs v. Bryant*. This was the case of a surety, who had a written (not sealed) promise of indemnity from the principal, and sued on the implied promise. See also *Cornwall v. Gould*, 4 *Pick.* 444.

<sup>3</sup> 1 *Pick.* 57, *Goodrich v. Lafflin*; 12 *Mod.* 509, by *Powell, J.*

<sup>4</sup> 1 *Pick.* 415, *Thurston v. Percival*.

<sup>5</sup> This doctrine prevails not only in an action by the payee against the maker, but also in an action by the indorsee against the maker. 2 *Phillipps on Evid.* 10, 13, 86; 4 *Pick.* 421, *Wild v. Fisher*; 8 *ib.* 48, *Cole v. Cushing*. The supreme court of Massachusetts made another exception to the general rule, above stated, in the case of *Moses v. Stevens* (2 *Pick.* 332), in which it was decided, that where an infant avoided a contract of service for three years, after he had served three months, his employer was liable, on an implied promise, for the service actually performed, as if no contract had been actually made. But this exception does not seem to be generally admitted; other courts have decided the point differently. See 5 *New Hamp.* 343, *Weeks v. Leighton*; 7 *Cowen*, 184; 8 *ib.* 84; *Peake's New Cases*, 196; 8 *Taunton*, 508.

"As the law will not generally imply a promise, where there is an express promise, so the law will not imply a promise of any person, against his own express declaration; because such declaration is repugnant to any implication of a promise."<sup>1</sup> This, however, can be true only where there is no legal duty paramount to the will of the party making the negative declaration: for where such duty exists, a promise will be implied, even against the party's strongest protestations; as in the cases of taxes, and claims for relieving paupers, before noticed; so if a husband wrongfully expel his wife from his house, and forbid all persons to trust her on his account, declaring that he will not pay for any thing that is furnished her,—the law, notwithstanding these express declarations, implies a promise, on his part, to pay for the supplies, which any other person provides for her necessary support;<sup>2</sup> and so in the instance of a father, who wrongfully discards a minor child.<sup>3</sup>

In these instances, it is manifestly only by a fiction, that a contract or promise is implied. And, indeed, the whole doctrine of implied contracts, in all their varieties, seems to be merely artificial and imaginary. But in the present state of the law, it is necessary, for the sake of legal conformity, to adopt this phraseology. In a great majority of cases, which occur under this head, there is, in England, no safe legal remedy, except the action of assumpsit, in which a promise and the breach thereof are required to be alleged, although the defendant in fact never made any promise, but always denied his liability, and expressly refused either to pay, or to promise payment.

There are, indeed, some cases, in which a party may, at his election, regard his injury as a breach of contract, or as

<sup>1</sup> By Parsons, C. J. 7 Mass. 109.

<sup>2</sup> 6 Mod. 171, Robison *v.* Gosnold; 4 Esp. Rep. 42, Harris *v.* Morris; 2 Kent's Comm. 125, 126; 4 Burr. 2178.

<sup>3</sup> 13 Johns. 480. See also 16 Mass. 31.

a tort, and may adopt the remedy appropriate to the alternative which he selects. Such cases, however, are not numerous; and when they occur, there is no necessity to resort to an implied contract, as there is another more apt course, which the party may pursue, with assurance of obtaining legal redress.

The action of debt, in which it is not necessary to aver a promise, is, in general, concurrent with that of *assumpsit*, on implied promises. But in England the defendant is permitted to wage his law, in an action of debt on simple contract; and, it was to avoid this evil, that *assumpsit* was there substituted, and the doctrine of implied promises, if not first introduced, was greatly extended. And though in most parts, if not the whole of this country, wager of law has never been allowed, yet we have adopted the English remedy of *assumpsit*, and the English doctrine of implied contracts.

If a new *Registrum Brevium* were now to be compiled, and new forms of setting forth causes of action were devised, we should probably adapt them to the truth of the case, and forego the fictions, that, at present, so extensively prevail.

Indeed, it was not without many reluctant struggles, that this doctrine of implied promises found admittance into the English law. The courts were slow and loth to sanction it. As late as the 11th year of William III., lord Holt asserted from the bench, that the notion of promises in law was a metaphysical notion,—that the law made no promises but where there was a promise of the party;<sup>1</sup> and in the third of Anne, he said, “there is no such thing as a promise in law.”<sup>2</sup> The same great judge also pronounced him to be a bold man, who first ventured on a general count in *indebitatus assumpsit*.<sup>3</sup>

<sup>1</sup> 1 Ld. Raym. 538.

<sup>2</sup> 6 Mod. 131.

<sup>3</sup> 2 Strange, 933. See also 3 Levinz, 150, *Johnson v. May*; 1 Sid. 279, *Grubham v. How*; *Vaugh.* 101; 3 Woodeson, 169, 170.

It was not until the latter part of the last century (long after implied promises had been recognised in divers other instances), that a surety, who had paid the debt of his principal, was allowed to maintain an action at law against the latter, on the implied contract of indemnity. He was compelled to resort to the court of chancery for reimbursement.<sup>1</sup> And it was not till 1800, that one of two sureties, who had paid the whole of the principal's debt, was held to be entitled at law to recover contribution from his co-surety.<sup>2</sup> Thirteen years before (1787), lord chief baron Eyre, in the case of a bill in equity by a surety, demanding contribution of a co-surety, asserted that contribution was not founded in contract, but on a principle of justice and equity.<sup>3</sup> The late chancellor (Kent) of New York affirmed the same doctrine. The courts of North Carolina refused to sustain an action at law, in such case, until jurisdiction was conferred by statute.<sup>4</sup>

Nor has the doctrine of implied promises even yet been carried to the extent, which fair analogy will warrant, and which legal symmetry requires. If two are sued for a joint tort, and judgment is recovered against both, and the execution is levied on one only, he cannot recover a moiety of the other, in an action on an implied contract.<sup>5</sup> Yet in many instances, it is as clearly just and equitable, that contribution should be made, under such circumstances, as under a payment of a claim founded on an original contract. Indeed, the judgment becomes a debt against the two defendants, and may be sued as such. The principle of equity, by

<sup>1</sup> 2 D. & E. 105.

<sup>2</sup> 2 Bos. & Pul. 268. Co-sureties must be joint undertakers, or the law of contribution does not hold. 3 Peters, 470. See also 2 Esp. Rep. 478; 12 Mass. 102.

<sup>3</sup> 1 Cox, 320; 2 B. & P. 272.

<sup>4</sup> See 4 Johns. Ch. Rep. 337; Cam. & Norw. Rep. 216; 2 Car. Law Repos. 624.

<sup>5</sup> 8 D. & E. 186; 1 Campb. 343; 2 ib. 452; 4 M. & S. 261; Kirby, 114; 1 Bibb, 562; 1 Randolph, 328.

which those who are equally liable to a common demand ought equally to sustain the burden of discharging it, seems to be disregarded in the case of joint wrong-doers. Such, however, was the Roman law. The French law (according to Pothier) allows an action for contribution, on the same principles, which are extended to a surety to recover against his co-sureties.<sup>1</sup>

In sound sense, divested of fiction and technicality, the only true ground, on which an action upon what is called an implied contract can be maintained, is that of justice, duty, and legal obligation. But, if the substance be secured, the form of obtaining it is of little comparative importance, provided it be, as in this instance, simple and direct, and not complicated, circuitous and troublesome.

The other distinction, to which we have already alluded, as requiring to be noticed, before entering upon an examination of the principles of the law of contracts, is that which is made in the books between executed and executory contracts. An executed contract is one, by which the subject of it is transferred immediately, or, by which the right and possession are transferred together; as if a horse is sold, paid for and delivered,—or an agreement to change horses is immediately performed.<sup>2</sup> An executory contract is rather an engagement to do a thing, than the actual doing of it:—it is prospective; as an agreement to change horses tomorrow, —or to build a house in six months.<sup>3</sup> An agreement may be executed by one party, and executory by the other; as when one party performs, and the other is trusted; thus, where a loan of money is made, on a promise to secure it by bond or mortgage; the lender has executed his part of the con-

<sup>1</sup> See 1 Pothier on Obl. by Evans, Phila. ed. 147; 2 ib. 70.

<sup>2</sup> "A contract executed is one, in which the object of the contract is performed." By Marshall, C. J. 6 Cranch, 136.

<sup>3</sup> Plowd. 9.

tract, but the borrower's contract remains executory until performed.<sup>1</sup>

"An agreement, on sufficient consideration, to do or not to do a particular thing," is, as has been before suggested, a sufficiently accurate definition of a simple contract. Agreement implies parties and their mutual assent; and, in speaking of lawful agreements, we necessarily include the legality of the consideration and of the thing to be done or omitted. A more extended definition, or description, is given by Mr. Chitty, in his *Treatise on the Law of Contracts not under seal* (p. 3) : "A mutual assent of two or more persons competent to contract, founded on a sufficient legal motive, inducement, or consideration to perform some legal act, or to omit to do any thing, the performance whereof is not enjoined by law." These several particulars, namely, the *assent*, the *parties*, the *consideration* or inducement, and the *legality* of the act or omission, require a separate and distinct examination. The present article will be devoted to the first.

The *assent* must be mutual, reciprocal, concurrent.

Overtures or offers, not definitively assented to by both parties, do not constitute a contract.<sup>2</sup> There must necessarily be some medium of communication, by which the "union of minds" may be ascertained and manifested. Among men, this medium is language,—symbolical, oral, or written. A proposal is made by one party, and is acceded to by the other, in some kind of language mutually intelligible; and this is mutual assent. Persons who are deaf and dumb contract only by symbolical or written language. The language of contracts at auction is often wholly sym-

<sup>1</sup> 2 Black. Comm. 447; 1 Powell on Cont. 234; 1 Com. on Cont. 3.

<sup>2</sup> Peake, 227, *Kingston v. Phelps*; 1 Stark. Rep. 9, *Gaunt v. Hill*; 3 Johns. 534, *Bruce v. Pearson*; 4 ib. 235, *Burnet v. Bisco*; 12 ib. 199, *Tucker v. Woods*. See also the remarks of Wilde J. 5 Pick. 384, 5; 1 Maule & S. 557; 2 Starkie on Evid. 650.

bolical. A nod or wink by one party, and a blow of a hammer given by the other, evince mutual assent.

An offer, or proposal, may be retracted at any time before it is accepted. A bidder at an auction may retract his bidding before the hammer is down.<sup>1</sup> So any other offer, whether written, oral, or symbolical, is subject to be revoked before acceptance. Even where, by the terms of the offer, time is given for the other party to accept or reject it, there is still *locus penitentiae* until the offer is accepted; and an acceptance, subsequent to the retraction, is of no avail.<sup>2</sup>

When by the terms of the offer, no time is prescribed, within which it is to be acceded to, it will be considered as withdrawn, or rejected, or at an end, if it is not seasonably accepted. What is seasonable acceptance,—in other words,—how long such unqualified offer shall continue open for acceptance, if not expressly retracted, depends on the circumstances of each case that may arise, and on the ordinary forms of intercourse and business between the parties. If they are together, this question is to be decided, not so much by the time that elapses between the offer and acceptance, as by the conduct of the parties, during that time; whether it be such as reasonably to imply that a negotiation is still open,—that the offer is neither rejected nor withdrawn. A separation of the parties, without reference to a future meeting, would, probably, in most if not in all cases, be regarded as decisive evidence that the offer no longer existed. When the parties are apart, and an offer is made in writing, or by oral message, a reasonable time is allowed for notice of acceptance to be returned; and this depends on the distance, the means of early communication, the nature of the business, usage, and various other circumstances, which may combine in a given case, but which cannot be fixed beforehand by any determinate rule. Every

<sup>1</sup> 3 D. & E. 148, Payne *v.* Cave.

<sup>2</sup> 4 Bing. 653; 1 Pick. 279. See also Rutherford, lib. i. c. 12, §§ 14, 20.

case of this sort, as well as the former, must be decided on its own circumstances.

In oral and symbolical communications, when the parties are together, the assent is mutual and the contract completed, when the acceptance of one party is announced to the other. And the law, perhaps, may be the same, when the parties are separated, and interchange verbal messages by the intervention of third persons. But in a case of written communications between parties distant from each other, the court of king's bench held, that the acceptance operated from the time it was made, and not merely from the time when the notice of it was received.<sup>1</sup> The court of errors, in New York, have made the like decision.<sup>2</sup> The supreme court of Massachusetts have decided this point differently,<sup>3</sup> though they held, that a retraction operated from the time it was made.<sup>4</sup> The case was this: An insurance company, on the first of January, offered by letter to insure a ship on certain terms. On the next day, they wrote another letter retracting the offer. The first letter was received by the owner of the ship, on the third of January, and he on that day replied to it, accepting the offer, before he received their second letter. All the letters were sent by mail and received by the parties on the second day after they were written. Of course, the offer was accepted before the retraction was made known, and the retraction was made before the acceptance was made known. It was decided, that there was no agreement to insure.<sup>5</sup>

An offer, or proposal, must be accepted or assented to, in

<sup>1</sup> 1 B. & A. 681, *Adams v. Lindsell*.

<sup>2</sup> 6 Wend., 103, *Mactier v. Frith*.

<sup>3</sup> 1 Pick. 279, *M'Culloch v. Eagle Ins. Co.*

<sup>4</sup> This distinction is, perhaps, not very obvious.

<sup>5</sup> There are cases, in which an acceptance of an offer is implied from the conduct and perhaps from the silence of the party to whom it is made, and in which no express notice of acceptance need be given. See 5 Pick. 380, *Train v. Gold*.

the terms on which it is made. Thus, if an offer is made, limiting the time or mode, in which it is to be accepted, an acceptance made after the time, or in a different mode, does not constitute a mutual agreement. Such acceptance can be regarded only as a new proposal by him to whom the offer was made, and requires the subsequent assent of the other party to make it a contract. As if a trader orders goods of a specified quantity, or on certain terms of credit, and a less quantity is forwarded, or on a shorter credit, he is not bound to receive and pay for them.<sup>1</sup> So, where an offer, by letter, to purchase goods, required an answer by the return of the waggon by which the letter was sent; and the offer was accepted by a letter sent by mail to a different place from that to which the waggon was to return, it was held that there was no contract.<sup>2</sup> By accepting goods sent on different terms, or by waving the difference in time or place, the party is regarded as acceding to the modified or varied terms proposed by the other, and thus the assent becomes mutual and the contract complete.<sup>3</sup>

In the case of *Adams v. Lindsell*,<sup>4</sup> where the defendant had by letter offered the plaintiff certain goods at a specified price, on receiving notice of acceptance "in course of post," but, by misdirection of the letter containing the offer, it was not received in the regular course of the post to the place of the plaintiff's residence; and, he, on receiving it two days afterwards, returned an answer by the first post according to the proposal; it was held that the contract was completed. As the misdirection was the error of the defendant, it was held that it should not affect the plaintiff; and that as the latter had replied by the earliest post, after he received the offer, it must be considered, as against the defendant, to be by the course of the post, within the terms of the offer.

<sup>1</sup> 3 Johns. 534, *Bruce v. Pearson*; 7 ib. 470, *Tuttle v. Love*; 1 Campbell, 53; 2 B. & C. 37.

<sup>2</sup> 4 Wheaton, 225, *Eliason v. Henshaw*; S. P. 4 Bing. 653.

<sup>3</sup> 1 Campb. 53; *Chitty on Contracts*, 132.

<sup>4</sup> 1 B. & A. 681.

It would seem from the case of *Cooke v. Oxley*,<sup>1</sup> that when time is given by one party for the other to accept the offer, the party making such offer is not bound by the other's acceptance, within the time mentioned. Oxley offered to sell Cooke two hundred and sixty six hogsheads of tobacco, at a certain price, and gave him, at his request, till four o'clock in the afternoon of the same day, "to agree to, or dissent from the proposal." Before that hour, Cooke gave Oxley notice of his assent to the proposal. But it was held, that Oxley was not bound,—that there was no contract. This is an extreme case (as it is generally understood), and seems not to have been much regarded in the subsequent decisions of the English courts.

The question arose on the declaration,—and that may have been bad, though the agreement may have been good. Yet Guillim, Chitty Jr., Starkie, and other compilers,—as well as eminent counsel, in cases where that decision has been cited,—have understood the principle of it to be as just stated.<sup>2</sup> The supreme court of New York understood it in the same way,<sup>3</sup> and inclined to regard it as sound law. The supreme court of Massachusetts also considered it in the same light, but questioned the soundness of the decision.<sup>4</sup>

In the case of *Humphries v. Carvalho*,<sup>5</sup> Bailey, J., says, that a writ of error was brought on the judgment of the king's bench, in the case of *Cooke v. Oxley*, "by which it appears, that the objection made was, that there was only a proposal of sale by the one party, and no allegation that the other party had acceded to the contract of sale." This would seem also to have been the view taken of the case by

<sup>1</sup> 3 D. & E. 653.

<sup>2</sup> Bac. Abr. *Assumpcit*, (C.) ; 1 Esp. Dig. (132), 252; Chitty on Contracts, 108; 3 Starkie on Evid. 1634.

<sup>3</sup> 12 Johns 190, *Tucker v. Woods*; 19 ib. 212; 1 Caines, 584.

<sup>4</sup> 1 Pick. 281.

<sup>5</sup> 16 East, 48.

lord Kenyon and Buller, J., in delivering their opinions, as reported by Durnford and East. Yet, the declaration, as given by the reporters, seems to us not to be chargeable with this defect.<sup>1</sup>

If the case be accurately reported, it seems to be not only unreasonable, and inconsistent with good faith, but at variance with acknowledged principles of law. Had Oxley retracted his offer, before it was accepted by Cooke, the acceptance afterwards would not have bound him. But the offer was not retracted, nor rejected, nor at an end, either expressly or by implication, before it was accepted. If, after the offer was made, the parties had separated, and no time had been given for future acceptance, an acceptance afterwards would have been too late. Whether, in such case, the offer would, in law, be considered as refused, or withdrawn, or as having expired, it is not material to inquire. It would not, at any rate, be considered as obligatory. By the terms of the offer in question, it was to remain open (unless previously retracted, accepted, or rejected), until four o'clock. It was a continuing offer.

Lord Kenyon's summary opinion is in these words : "Nothing can be clearer than that at the time of entering into this contract, the engagement was all on one side ; the other party was not bound ; it was therefore *nudum pactum*." Grose, J., says, "the agreement was not binding on the plaintiff before four o'clock." These expressions are very strong proof, that the question was not understood by the court, as it has been by others, and that the declaration is misstated in the report. For in all contracts, the offer is made by one side, and the other is never obliged to accept it. And lord Kenyon could not mean to say, that no acceptance binds the party who makes the offer ; and yet his assertion would involve this consequence, and prevent the com-

<sup>1</sup> On special demurrer, however, this declaration would probably have been rightly adjudged ill, for lack of sufficiently explicit and technical averments.

pletion of any contract whatever. If he who makes an offer is not bound by its acceptance, because the other party is not obliged to accept it, it follows, by parity of reason, that he who accepts the offer is not bound by the acceptance, because the other party is not obliged to receive it; and, thus, on this ground, no binding agreement could ever be made.

It has been said, in defence of the supposed doctrine of *Cooke v. Oxley*, that it is a principle of contracts, that both parties must be bound, in order to bind either. This means, however, nothing more than that the assent of both parties is necessary to constitute an agreement; but both parties may as well consent that the one shall be bound, and the other retain, for a specified time, his option to be bound or not, as that any other arrangement shall be made. And in common business, it often happens, that contracts are made, optional with one party and obligatory on the other. As where one buys a horse under an agreement, that it may be returned in a limited time, if it prove restive, or do not suit the purchaser's family. Here the seller is bound to receive the horse, if returned within the time, but the buyer is not bound to return it.<sup>1</sup> So if one engages to take and pay for grain,—from five hundred to one thousand bushels,—he is bound to take one thousand bushels, or five hundred, or any intermediate quantity; but the other is not obliged to deliver more than the smallest quantity mentioned.<sup>2</sup>

It is further said, in support of the case under examination, that mutual promises, where one is the consideration of the other, must be made at the same time, or they are not binding.<sup>3</sup> But no proposal and acceptance can be strictly simultaneous. The medium of communication among men

<sup>1</sup> See *Clayton*, 118, *Clarke's case*.

<sup>2</sup> 3 *Johns. Cases*, 81; 2 *ib.* 253; 16 *East*, 45; 1 *D. & E.* 135; 4 *Greenleaf*, 497, *Small v. Quincy*.

<sup>3</sup> "The promises must be at one instant." *Hobart*, 88, *Nichols v. Raynbred*.

does not allow it. One must precede the other. And if the party making the proposal is bound by the acceptance, when tendered immediately (as is universally admitted), it is not easy to perceive why he is less bound, when it is tendered within the time specified by the proposal itself. The offer, in the latter case, is a continuing offer, and may be regarded in law as made at the last moment of time preceding the acceptance; and the acceptance and offer are, in legal contemplation, "at one instant."<sup>1</sup>

This rule concerning mutual promises, when examined, will be found to import nothing more, than that there must be reciprocal assent (as it has already been explained) to constitute a contract. The rule has been well discussed on a question of pleading. In setting forth such promises in a declaration, it is necessary that they should be alleged to be concurrent. According to the precedents and decisions, the party suing, when he has stated the offer on the one part, must aver, that thereupon, or then, an acceptance thereof was made on the other part.<sup>2</sup> Alleging the acceptance or promise, on the other part, to have been made "afterwards on the same day," has been held to be bad.<sup>3</sup>

Though this may at first appear to be hypercritical, it will be found, on consideration, to be sound and reasonable. It is a most salutary rule of pleading, that a party must set forth his cause of action or defence, with reasonable certainty. It must, to say the least, not appear, from his own showing and statement, that he has no cause of action, or no ground of defence; nor that he may have none, although his statement be taken as wholly true. But in setting forth an offer on a given day, and averring an acceptance afterwards, though on the same day, a party does not show necessarily, that

<sup>1</sup> See 1 B. & A. 683; 6 Wend. 115.

<sup>2</sup> In point of form, the offer and acceptance, usually, are both described as promises.

<sup>3</sup> See 1 Caines, 584; 12 Johns. 400.

there was any mutual assent. The offer, as has before been stated, may have been retracted, or rejected, or have expired, within an hour from the time it was made. And as this depends on such a variety of circumstances, peculiar to every case, it would be a great stretch of credulity, as well as of legal presumption, to assume that an acceptance of an offer, on the same day it is made, does of course evince a mutual concurrent assent of the parties, according to the principles before suggested.

Strict, however, as this doctrine of alleging mutual promises undoubtedly is, it does not help to support the decision in *Cooke v. Oxley*, as reported, and as understood by so many writers and judges. For by alleging the offer on a certain day, according to its terms, and averring an acceptance at or before the hour allowed therefor, a concurrent assent is shown, and mutual promises at the same instant. For there was, as has been repeatedly suggested, a continuing offer, in that case, as well as in those, which have been cited, where an offer was sent and an acceptance returned by mail. In the case of *Adams v. Lindsell*,<sup>1</sup> the court say, "the defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiff; and then the contract is completed by the acceptance of it by the latter." That case directly impugns the doctrine of *Cooke v. Oxley* (which was pressed upon the court), and may be considered as having overruled it, if indeed it ever was decided on the ground so generally supposed. So in the cases of *Eliason v. Henshaw*<sup>2</sup> and *McCulloch v. Eagle Insurance Company*,<sup>3</sup> the courts proceeded on the assumption, that if the offers by letter had not been retracted, and the answers had been duly received, according to the prescribed terms, the contracts would have been completed.

<sup>1</sup> 1 B. & A. 683.

<sup>2</sup> 4 Wheaton, 225.

<sup>3</sup> 1 Pick. 278.

"A scruple," says Puffendorf, "has sometimes been moved, whether the obligation in the promiser begins at the very moment when the offer is accepted by the other party; or whether it is farther necessary, that the acceptance be made known to the promiser? And here it is certain, that a promise may be designed and expounded two ways; either thus—I engage myself to do the thing, if it shall be accepted; or thus—I engage myself to do the thing, if I shall understand that it will be accepted. Now, which of the two senses the promiser intended, is to be gathered and presumed from the nature of the business. If the promise were a matter of pure generosity, without restriction or limitation, we are to believe it was meant in the former sense; because here the promiser hastens, as it were, to bind himself, without staying for any formality in the other party. But those promises are to be understood in the latter sense, which express some arbitrary or mixt condition essential to the engagement."<sup>1</sup>

Barbeyrac, in his notes on Grotius,<sup>2</sup> says this case is to be decided in a quite contrary manner. "If one mentally accedes to an offer, there is in fact an union of minds; but assent must be proved—therefore, a manifestation of assent is necessary, as matter of evidence. It follows, that assent to a proposal operates from the time it is expressed. When parties are together, therefore, the assent to a proposal operates from the time it is conveyed to the proposer. When they are apart, and communicate by message or letter, the assent operates from the time when the party expresses his assent to the messenger, or puts it on paper in the form of an acceding to the offer made to him."

We know of but two cases in the common law (including the law merchant in this designation), in which the second

<sup>1</sup> Puffendorf, lib. iii. c. 6, § 15. See also Vitriarius, lib. ii., c. 11, § 30; Hutcheson's Moral Philosophy, lib. ii., c. 9, §§ 6, 7.

<sup>2</sup> Lib. ii., c 11, § 15.

way of expounding a promise (as mentioned by Puffendorf) is adopted, viz. : 1. That of one class of guaranties of others' debts; <sup>1</sup> and 2. That of the acceptance of a draft or bill of exchange.<sup>2</sup>

Assent must not only be mutual but free. Hence agreements extorted by violence or terror (called duress) are invalid. Duress, that avoids a contract, is of two kinds; duress of imprisonment, and duress *per minas*. Such duress of imprisonment is the illegal restraint of personal liberty, whether in a prison or elsewhere; or illegal force or privation imposed upon a person lawfully imprisoned; for the purpose of extorting some promise or contract from the person thus restrained.<sup>3</sup>

It seems to have been formerly held, that imprisonment under regular and formal legal process, though malicious and without probable cause, did not constitute such duress;<sup>4</sup> and Mr. Chitty supposes that such is now the law of England.<sup>5</sup> This notion is founded in an extravagant regard to the sanctity of legal process regularly issued: *Executio juris non habet injuriam*. But it has been decided in Massachusetts and New Hampshire, that process, though in form regular and legal, sued out maliciously and without probable cause, to arrest and imprison a man, is such duress as will avoid a deed given by him to procure his deliverance.<sup>6</sup>

<sup>1</sup> 2 Starkie on Evid. 649; 6 Greenleaf, 60; 7 Greenleaf, 115.

<sup>2</sup> 5 B. & A. 474, Cox *v.* Troy. The attempt to give this exposition to the promise in Train *v.* Gold (5 Pick. 380) was promptly put down. The principles above stated seem to stand directly opposed to the decision in the case of McCulloch *v.* Eagle Ins. Co. (1 Pick. 278). The opinion of Marcy, J. (6 Wendell, 103) is also very satisfactory, as he had that case before him. His citations from Pothier and Delvincourt, and other writers, fully sustain his judgment. But on mere elementary principles, the doctrine seems very clear. Rutherford is quite perfunctory on this point. Lib. i. c. 12, § 14.

<sup>3</sup> 2 Inst. 482; Bacon's Abr. Duress (A); Sheph. Touch. 61; 6 Mass. 511; Perkins, § 17; Finch, 102.

<sup>4</sup> 1 Levinz, 69.

<sup>5</sup> Chitty on Cont. 55.

<sup>6</sup> 6 Mass. 506, Watkins *v.* Baird; 3 New Hamp. 506. See also Aleyn, 92; Buller's N. P. 172.

As a general rule, imprisonment by order of law is not duress that will avoid a contract; and therefore, if a man, supposing that he has cause of action against another, cause him to be arrested and imprisoned by lawful process, and the defendant voluntarily execute a deed or note, or make any other promise, to obtain his deliverance, he cannot avoid such contract by duress of imprisonment, although the plaintiff had no cause of action: <sup>1</sup> *a fortiori*, if a man, under arrest, or imprisoned, for a just cause, make an agreement voluntarily for the purpose of procuring his liberty, he cannot avoid it on the ground of duress.<sup>2</sup> If the process, under which a party is arrested or imprisoned, be void,—as if the court have no jurisdiction of the cause, or no authority to issue such process,—the arrest or imprisonment is, of course, unlawful, and an obligation given by the prisoner (as a bail bond, &c.), for his enlargement, is voidable for duress.<sup>3</sup> Duress *per minas* is, 1. for fear of loss of life; 2. of loss of member; 3. of mayhem; 4. of imprisonment.<sup>4</sup> And this fear must be upon sufficient reasons: *Non suspicio cuiuslibet vani et meticulosi hominis, sed talis qui possit cadere in virum constantem.*<sup>5</sup> Menace of a mere battery, or to destroy property—even to burn one's house,—seems, by the preponderance of authority, not to amount to duress.<sup>6</sup> A firm man,—*vir constans*,—it is said, may withstand such

<sup>1</sup> 6 Mass. 511; Hobart, 266, 267. But see Bull. N. P. 172; *Termes de la Ley*, (Duress); 1 Lill. Abr. 494; where it is laid down that, if the cause of action is not good, a bond so given, is voidable for duress.

<sup>2</sup> 3 Caines, 168; 2 Inst. 482; 3 Leon. 239; Perk. § 18; 1 Fairfield, 395; 1 Bailey, 84.

<sup>3</sup> Cro. Eliz. 647; 4 Inst. 97; S. P. 15 Johns. 256. See also 7 D. & E. 376; where lord Kenyon says, that a bail bond, executed by a person under arrest, where the affidavit to hold to bail is insufficient, may be avoided on the ground of duress. See also 8 Greenleaf, 426.

<sup>4</sup> 2 Inst. 483; Bac. Abr. Duress (A.)

<sup>5</sup> Bracton.

<sup>6</sup> 2 Inst. 483; 11 Mod. 203; 2 Strange, 917; 1 Bl. Com. 133; Co. Litt. 253, b.; Perk., § 18; Com. Dig. Pleader, 2 W. 20; 2 Gallison, 337; Finch 102; Hardin's Rep. 605.

menaces ; and if they are executed, the party injured may recover damages in proportion to the injury done him.

“ This, however,” as Mr. Starkie observes, “ is clearly a very inadequate reason for the distinction, and may be frequently false in fact.”<sup>1</sup> And Mr. Chitty doubts, whether, at the present day, the threat to commit so serious an injury as the burning of a house (which is a capital offence, and naturally involves and endangers personal safety), would not be considered such duress as will avoid a contract.<sup>2</sup>

In South Carolina, the courts have holden, that there may be cases, in which a man’s necessities are so urgent and pressing, that duress of his goods may avoid his acts ;<sup>3</sup> and where the party is unable to make satisfaction, or where there is no speedy tribunal to enforce it,—it is there said—as the reason of the law ceases, the law itself does not apply.

This doctrine of duress may be summarily stated thus, viz. :—Any agreement made by a person under coercion by illegal imprisonment,—or under illegal force or privation imposed on him while legally restrained,—or under threats which induce a reasonable fear of loss of life, or of mayhem, or of imprisonment,—are not binding, and may be avoided.

This limited sphere for the operation of the doctrine is characteristic of the age in which it was fixed,—an age in which personal valor was in constant requisition, and was deemed to be, in a great measure, its own reward ; and when he, who chose to resort to the law for redress of minor injuries, was regarded as *homo vanus et meticulosus*. A high

<sup>1</sup> 2 Stark. on Evid. 482.

<sup>2</sup> Chitty on Cont. 56. Threatening a prosecution for the recovery of penalties does not constitute duress. 6 East, 140.

There is a case in the yearbook (Ass. 29. pl. 14.), which is abridged by Rolle (1 Rol. Abr. 687), in which a deed obtained by duress done to the party by taking his cattle, was avoided, though there was no duress to his person. But this doctrine was overruled in the case above cited from Strange and 11 Modern. See Bull. N. P. 173; Sheph. Touch. 61.

<sup>3</sup> 1 Bay, 470; 2 Bay, 211.

regard, however, for personal liberty, is evinced by the effect which is allowed to fear of restraint, while it is denied to fear of the most serious injury to property.

There are numerous instances, in which a court of chancery relieves against contracts entered into by a compulsion that is not sufficient to avoid them at law. These cases, however, are decided, each of them, on their peculiar circumstances, and are not properly within the scope of our present examination. So a will (which is not strictly a contract) may be avoided on the ground of undue influence and restraint exercised upon the testator—though not amounting to duress, that would avoid his bond or note. It is said in an old case,<sup>1</sup> that if a man makes a will in his sickness, by the over importunity of his wife, to the end he may be quiet, it shall be set aside as made by restraint. This is not now regarded as law,—but importunity (legally taken) “must be in such a degree as to take away from the testator free agency.” It must be such as he is too weak to resist—“such as will render the act no longer the act of the deceased.”<sup>2</sup>

The duress that will avoid a contract must be done to the party himself. If, therefore, two or more make an obligation by reason of duress to one of them only, it can be avoided only by him upon whom the duress was practised. A surety is held to perform the engagement made by himself and principal, though it was made solely to relieve the principal from duress.<sup>3</sup> This doctrine, however, is said to be “applicable only to cases depending on common law principles, and where there is no statutory provision interposed.” And, therefore, where a sheriff, after suffering a voluntary escape of a prisoner in execution, retook and re-

<sup>1</sup> Style, 427, *Hacker v. Newborn*.

<sup>2</sup> By Sir John Nicholl; 2 *Phillimore*, 551, *Kinleside v. Harrison*.

<sup>3</sup> 1 *Brownlow*, 64; *Cro. Jac.* 187; 1 *Freeman*, 351; 2 *Haywood (N. C.)* 102; *Sheph. Touch.* 62; 5 *Littell*, 149.

committed him to prison (contrary to the statutes of New York), and the prisoner thereupon gave bond, with a surety, to remain a true prisoner on the prison limits, it was decided, that the surety might avoid his bond, for duress to the principal.<sup>1</sup> The doctrine is applicable only to contracts by specialty, in which no consideration is necessary. A parol contract of a surety, in such a case, might be void for want of consideration.<sup>2</sup>

Husband and wife are regarded in law, for most purposes, as one person. An obligation, therefore, made by the husband, to relieve the wife from duress, may be avoided, as if the duress had been done to himself.<sup>3</sup> But, in no other case, can a man avoid his deed by duress to another, let him be related how he will.<sup>4</sup>

It is said in some of the old books, that duress by a stranger to the deed, unless practised at the instance of the obligee, will not avoid the deed.<sup>5</sup> But the better opinion is,

<sup>1</sup> 15 Johnson, 256, *Thompson v. Lockwood*. This case seems to fall into the class of those, in which the contract is void for want of authority in the officer who exacts it.

<sup>2</sup> 1 Bay, 13, *Evans v. Huey*. The decision in this case was clearly right, on the ground of want of consideration for the note,—whatever may be thought of the ground taken by the court.

<sup>3</sup> 1 Siderfin, 123; *Sheph. Touch.* 61; 2 Brownlow, 276; *Bac. Abr. Duress* (B).

<sup>4</sup> So says Twisden, J. (1 Freeman, 351), and so it is expressly laid down in *Sheph. Touch.* 61. Such, doubtless, is the weight of authority. In a case in North Carolina (2 Heywood, 102), a bond executed by a mother, to procure the enlargement of her son, who was under duress, was held to be binding on her. There are authorities, however, which countenance a more liberal extension of the doctrine of duress. Wylde, J., says (1 Freeman, 351) "if the duress be to a father or brother, and a son enter into bond, this is a duress to the son, and he may plead it." So it is said (2 Brownlow, 276) that a father may avoid his deed that he hath sealed by the duress of the imprisonment of his son—but not of his servant.—And so mayor and commonalty may avoid a deed sealed by duress of imprisonment of the mayor. See also 1 Rol. Abr. 687; *Bac Abr. Duress* (B).

<sup>5</sup> *Keilway*, 154 a.

that a deed so procured is void as to the party to whom it is made. "If one threaten a man to kill him, unless he will seal a deed to him and three others, and he do so, this is void as to all the four. For if one threaten another to kill or maim him, if he will not seal a deed to a stranger, and thereupon he do so, this is void as if it were to the party himself."<sup>1</sup> And such is the rule of the civil law.<sup>2</sup> It has been held, from the earliest times, that duress imposed by a stranger to the contract, if by the procurement of the party to be benefited, will vitiate it.<sup>3</sup>

A party, who has made a contract while under duress, may, by his subsequent conduct, render it valid or estop himself to deny its validity. As if one makes an obligation by duress, and afterwards, when he is at liberty, takes a defeasance upon it.<sup>4</sup> So if a man acknowledges a bargain and sale of lands, &c. (in England), in the court where the deed is to be enrolled, or before the officer who makes the enrollment, and it is enrolled, he cannot afterwards plead duress.<sup>5</sup> And where a feme covert acknowledges a deed executed by her,—on a private examination before a magistrate,—it cannot be avoided for duress.<sup>6</sup> In these instances, an actual inquiry is instituted concerning the will of the party. But in Massachusetts, acknowledging a deed is regarded as of such trivial importance, that it does not estop the party nor his heirs to avoid it for duress.<sup>7</sup> It was always held, however, that if a party under duress promises, for the purpose of regaining his liberty, to execute a bond or other instrument, and afterwards, while at large, performs his promise, it is nevertheless avoidable.<sup>8</sup>

<sup>1</sup> Sheph. Touch. 61; Jacob's Law Dict. (Duress).

<sup>2</sup> Hein. Elem. s. o. Pand. lib. iv. tit. 2.

<sup>3</sup> 1 Rol. Abr. 688.

<sup>4</sup> Sheph. Touch. 62, 288.

<sup>5</sup> 1 Rol. Abr. 862; Bac. Abr. Duress, (C.) See 4 Mass. 544; 13 ib. 377.

<sup>6</sup> 1 Harr. & M'Hen. 211, *Bissett v. Bissett*.

<sup>7</sup> 13 Mass. 371, *Worcester v. Eaton*.

<sup>8</sup> *Keilway*, 52 b; Sheph. Touch. 61; Finch, 10.

A marriage contract obtained by duress may also be avoided, though celebrated by religious rites *in facie ecclesiae*. Indeed, the marriage contract, as it is governed, in many respects, by the ecclesiastical and statute law, in England, is often annulled for causes, which, though analogous to duress by the common law, do not range under that head.

By the civil law, the party, who entered into a contract while under duress, was compelled to institute a process of rescission within ten years, or he would have been held to perform it.<sup>1</sup> By the common law, the party may avoid such contract, by pleading duress, or giving it in evidence, when sued for breach of the contract.

On a retrospect of the common law doctrine of duress, it will occur to every mind, that its operation is confined within very narrow and somewhat arbitrary limits, and is by no means co-extensive with the principles of natural law, as expounded by the most approved writers.<sup>2</sup>

Assent must be not only mutual and free, but must also be without error respecting the subject of agreement. By the civil law, "error annuls the agreement, not only when it affects the identity of the subject, but also when it affects that quality of the subject, which the parties have principally in contemplation, and which makes the substance of it."<sup>3</sup> This, which is called error by the civilians, is in the common law usually denominated mistake; the word error having a technical meaning of a very different kind,

<sup>1</sup> This process is somewhat analogous to an application for relief to a court of equity.

<sup>2</sup> See Grotius, lib. ii. c. 11, 12; Grebner, *Jus Nat. Pars* ii. § 1, c. 7; Pufendorf, lib. iii. c. 4-9; Heinec. *Jus Nat. et Gent.* lib. i. c. 14, 15; Hutcheson's *Mor. Philos.* lib. ii. c. 9; Rutherford, lib. i. c. 12, § 16.

<sup>3</sup> 1 Poth. on Obl. (by Evans) 11.

Error consensui obstat. Si enim in re erro, non in illam sane consentio, sed in aliam, quæ tum menti mea obversabatur. Hein. Recit. 475; Elem. s. o. Inst. lib. iii. tit. 24. Ea non liberè velle possumus, circa quæ errore ducimur. Grebner.

and being therefore seldom used in its popular sense by legal writers. In both systems, the integrity of the contracting parties is assumed ; for, if intentional deception be practised by either party, it is termed fraud—*dolus malus*. The rule of the civil and common law is the same, so far as it regards the identity of the subject of the agreement.

Where the subject of the agreement is the person, or where a consideration of the person with whom an agreement is made forms an ingredient of the agreement, a mistake respecting the person destroys assent and annuls the agreement.<sup>1</sup> As if a man, intending to make a gift or loan to one, gives or loans to another, mistaking him for the first, the gift or loan is void for want of assent. So of a sale on credit, or an agreement to sell on credit, to one person, mistaking him for another. So also of a promise of marriage. Such cases, however, can seldom occur ; and the rule is of little practical importance. In almost all instances of misapprehension of the person, there is fraud, which is a distinct ground of avoiding contracts.

Where a mistake occurs respecting the identity of the subject of the agreement, assent is not given, and the contract of course is void ; as where a contract was for lime in casks, and the casks were found to contain sand and stones.<sup>2</sup> So where counterfeit coins or notes are taken and passed as genuine.<sup>3</sup> If however certain coins or notes are specifically agreed to be received, it is not regarded as a bargain for cash ; and if they prove to be spurious, the loss falls on the holder. The party receiving them is understood to take the risk, and there is no mistake as to the identity of the subject.<sup>4</sup> And in some cases, negligence in the party receiving worthless coin, or notes, will fix the loss on him ;<sup>5</sup> as if a party do not

<sup>1</sup> 1 Poth. on Obl. (by Evans) 12.

<sup>2</sup> 15 Mass. 319, *Conner v. Henderson* ; 2 Greenleaf, 139.

<sup>3</sup> 6 Mass. 182. 321 ; 5 Taunt. 488 ; 2 Johns. 455.

<sup>4</sup> 1 D. & E. 225 ; 6 Mass. 321 ; 3 Starkie on Evid. 1089.

<sup>5</sup> 17 Mass. 1. 33 ; 10 Wheaton, 333.

seasonably return them, or if he pay a note forged against himself.<sup>1</sup>

Pothier gives, as an instance of error in the identity of the subject of the contract, which renders it void for want of assent, the purchase of candlesticks as silver, which are only plated. But in the case of *Chadelor v. Lopus*,<sup>2</sup> the contrary was held by all the judges of England, except one, in the case of a stone bought and sold as a bezoar-stone, which proved to be of some other species less valuable. Parker, C. J., says,<sup>3</sup> that this case "would not now be received as law in England, certainly not in our country." Probably, however, he questioned the case on different grounds, from that which we are now considering; and the current of decisions, at common law, both here and in England, runs very strongly against Pothier's doctrine, as applied in the instance just mentioned. By those decisions, that instance ranges under the head of mistakes that affect the quality of the subject of agreement, as to which the civil and common law are totally different. Mr. Evans, in a note to his edition of Pothier (p. 13), mentions, as a case of error in the subject of the contract, that a painting was sold as an original of Poussin, but it appearing afterwards to be the work of some other person, it was held that the sale was void, and the purchaser entitled to reclaim his money. This, if (as it seems to have been) a case in the English courts, is directly impugned by the case of *Jendwine v. Slade*,<sup>4</sup> and is at variance with the principles of numerous adjudications.<sup>5</sup>

As to mistake or error, which affects the quality of the subject of agreement, whether the error be what the civilians term essential, which annuls a contract, or accidental, which only gives a right of action for damages, there is, as before suggested, no similarity in the civil and common law.

<sup>1</sup> 3 *Burrow*, 1354; 4 *Dallas*, 234.

<sup>2</sup> *Cro. Jac.* 4.

<sup>3</sup> 13 *Mass.* 143.

<sup>4</sup> 2 *Esp. Rep.* 572.

<sup>5</sup> See 1 *Stark. Rep.* 352, *Hill v. Gray*; 12 *Johns.* 190, *Tucker v. Woods*.

By the principles of the common law, so far as they apply to contracts of sale, a purchaser has no remedy against the seller, for any defect in the quality of the article sold, unless the seller is guilty of fraud, or makes a warranty upon the sale. There is, perhaps, room for doubt, whether there is not an exception to this rule, in the case of a sale of provisions. But this point, as well as the whole doctrine, belongs to the subject of the sale of personal property, rather than to that of contracts generally.

Assent must be given without fraud, on the part of him who procures it, as well as without mistake respecting the subject of the agreement. Fraud avoids all contracts, *ab initio*, both at law and in equity; the assent essential to a contract not being honestly obtained. The civil law definition of fraud—*dolus*—is “*omnis calliditas, fallacia, machinatio, ad decipiendum, fallendum, circumveniendum alterum adhibita.*” We know of no precise definition, in the books of common law, of the term fraud; but it is usually described in nearly the same manner as by the civilians; and is said to involve some artful device, or deceitful practice, contrary to the plain rules of common honesty, whereby a man is cheated and deprived of his right. It will be found, however, that on many subjects of contract, the civil and common law regard the same conduct in a very different light.

There are numerous fraudulent devices and practices, by which one party to a contract deceives and injures the other. In general, such fraud consists of misrepresentation or concealment of material facts, *suggestio falsi aut suppressio veri*. As the question of fraud, or no fraud, depends on the particular facts of each case, the relative situation of the parties, and their capacities and means of information, it is not easy to lay down, with much precision, any general, elementary doctrine, which would not tend rather to mislead than to enlighten and direct. Besides—those acts or

omissions, which would be regarded as similar, when viewed with reference to their ethical quality, are sometimes regarded by the law as allowable and honest, and sometimes as fraudulent and covinous,—according to the subject of the contract to which they apply. Those kinds of fraud, which avoid contracts, not on the ground of defective assent, or assent fraudulently obtained from one party by the other, but because the contracts themselves injuriously affect third persons or the public, have no bearing on this part of the law of contracts.

There is the same difference between the common and civil law, as to the mode of avoiding contracts made under a fraudulent imposition, which was mentioned under the head of duress, viz:—showing the fraud on a trial, by the common law, and a process of rescission, by the civil.

T. M.

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## ART. II.—INTRODUCTION TO PRIVATE INTERNATIONAL LAW.<sup>1</sup>

[By Mr. Victor Foucher, king's advocate-general in the royal court of Rennes.]

THE science of law, considered in its general relations, is nothing less than the science of man; allying itself with the history of the universe, the law sums up and fixes its results, at each great period in the life of humanity.

At the present day, when philosophy would not dare to raise a doubt of the divine existence,—when so many contacts between men have taught them to look upon one another without fear,—to investigate the design of their first constitution,—to give an account to themselves of those grand historical scenes, of those great deluges which have

<sup>1</sup> This introduction forms the prolegomena to a manual of private international law, which will appear immediately.

animated and agitated our globe, and which constitute, as it were, the acts of the drama of civilization,—man, enlightened by the experience of so many centuries, may advance with a more confident step in the study of life, and determine in a positive and truer manner the law of his nature, that is to say, his rights and his obligations, under whatever aspect he may regard his being; whether he elevate his thought to God, whose existence is so strongly declared by the admirable fitness of each atom of creation to accomplish its destiny;—whether he turn his thoughts inwardly upon himself, and investigate the depths of his consciousness, the action of which proves the divine essence;—or, whether, looking into the world without, he puts himself in communion with his fellow men and acknowledges the attraction, which leads him to unite with them, and, of so many isolated weaknesses, to form a concentrated force, capable of accomplishing the purpose of their common origin.

If, therefore, every thing in nature has its law,—who does not at once see the immensity of the science of law?—who does not perceive the numerous divisions, of which it is susceptible?

When we come afterwards to investigate the laws which connect men together upon this earth, what we have already said is sufficient to lead to a classification in relation to the object of each rule of action;—hence, natural law, the law of nations, public law, civil law, all links of that chain, which unites earth with heaven, the creature to the creator, the son to his father, man to his fellow men, and the citizen to his country.

Among these different branches of law, we have selected that which tends to regulate the relations of the citizens of different nations towards one another, as the object of this work, in which we propose to trace out for ourselves a circle, which will permit us to sum up and exhibit the history of this department in its most active and constant results.

It is not our purpose to examine all the theories begotten by the human mind on the nature of man, on his inclinations, his tendencies, and his destiny ; theories, which are for the most part purely speculative, and in which the facts are scarcely taken into account ; but, taking the science in the state to which it has been carried by the action of civilization, we have sought to lay down the general principles, which govern the relations of nations among themselves, in order to determine the relations of the citizens of these different nations ; for, as international law is a law of customs and consent, as well as an ethical and positive law, it divides itself into two branches, which, departing from the same source, and concurring to the same end, have nevertheless a different object ; the one regulating the political relations of nation to nation, the other the reciprocal relations of the inhabitants of different states, or of individuals in regard to foreign states ; the first may be called *public* international law, the other we shall denominate *private* international law.

This classification will doubtless be criticised ; but, we shall soon see how much in this matter, terms may vary : and, so abandoning all verbal controversy, and saying with Mr. Jouffroy, " that words are indifferent, provided we are understood," we have thought, that as we call public law the laws which regulate in each state the general political and social interests, and private law those which concern the rights and obligations of individuals towards one another ; we might call public international law that which has for its object the political relations of nations, and private international law that, which, based upon the first, is occupied more particularly with the reciprocal and personal relations of the inhabitants of different states, and of strangers temporarily within those states.

Limited within this circle, our task is still a heavy one ; for, in birth, association, reproduction, possession, contract,

commerce, death, man, at each period as at each act of life, encounters the social bond which enchains and protects him.

As the earth belongs to man, he may, in virtue of his liberty of locomotion, traverse it entire without other limits than those of the globe, and without other barriers than the institutions of each people.

As man is destined to the social state, wherever he transports himself he finds in his relations with his fellow-men a continued source of rights and of obligations, either towards his mother-country, or in regard to the other societies through which he passes or among whom he resides.

And taking man in the womb of his mother, or closing the tomb over his body, to be revived in his representatives, his rights and his obligations must be considered according as they attach themselves to his personal, political or civil capacity, to the goods which he may possess or acquire, to the agreements, and contracts which he may form, to the commercial acts to which he may devote himself, and lastly to the transgressions of the laws of the country where he is found.

#### BASIS OF INTERNATIONAL LAW.

Man, being born free and intended for society, finds in this double disposition of his nature, the basis of all his relations with his fellow-men.

The natural liberty of man is the appanage of all; it establishes the equality and independence of each individual, as it also determines the principle and the limits of the legitimacy of his actions.

Natural liberty is that in virtue of which, according to the definition of Bodin, "one is not subject, after God, to living man, and cannot admit of any commandment but from himself, that is to say, from his reason, which is always conformed to the will of God."

Sociality leads man to form and maintain with his fellow-

men an intercourse of assistance and services, conformed to the constitution of humanity, and the end of which is, that each one may provide, in the best manner, for his own proper interests.

Some publicists, among whom we remark Hobbes, have not hesitated to attribute the commencement of civil society to a mutual fear, and to treat that natural tendency of man towards man, which we have assigned as the true source of the social state, as an error ; but this melancholy and impious doctrine cannot be maintained in the face of the history of man ; and the mind reposes in peace, when it sees such philosophers as Plato, Aristotle, Cicero, Grotius, Filangieri, united in doing justice to this sophism.

Liberty and sociality, which are the essential characteristics of humanity, are therefore the two fundamental principles of all human association ; and, from the agreement of these two constitutive bases must arise the best social state, to which the children of men may attain.

For a long time, however, the same want of preservation and tranquillity, which led them to associate and unite together into national bodies, held societies in a state of reciprocal distrust ; for, being almost always rivals or in want, their first contact was a collision, in which brute force decreed the victory ; it was then that an opinion prevailed, which has been revived by some moderns, that as sovereign powers have no judge here below, when they cannot agree, war is the process, which they commence before the tribunal of fate, and victory the supreme decree.

The Greeks and the Romans furnish us with numerous examples of this opinion ; and the *adversus hostem æterna auctoritas* of the law of the twelve tables, is one of those eternal rules of the law of nations in their infancy, which they break with their leading-strings ; so that already in the time of Cicero, the enemy was nothing more than a stranger to the Roman republic : *hostis enim apud majores nostros is dicebatur quem nunc peregrinam dicimus.*

International law is above all the product of civilization, the incessant action of which, deriving a new energy from the coming of the Savior on the earth, is every day drawing man to man, and society to society, and tending to amalgamate all in the same unity.

Far from us, however, be the notion of an universal republic, the Utopia of some thinkers, or of an universal monarchy, the ambitious dream of some great kings and bold conquerors; but, we think, that the greatest good of the greatest number, by means of the greatest agreement of the principles which constitue society, will result, in proportion as men shall multiply their relations, and shall enter upon the same path, conducting to the same end.

When we follow with history the formation of the law of nations, we see it first in connection with conquests, compelling the small nations to combine together, to resist the spoliations to which they were alike exposed; then taking an immense extension by christianity, which revealed to men their celestial fraternity, assigned to them a common centre, and impressed upon them that single direction, which, in the times of Charlemagne, and of Charles the Fifth, presented to the world the grand spectacle of the pope and the emperor, holding one the spiritual and the other the temporal sword, put by God himself into their hands, for the protection of christendom.

At successive epochs, the crusades, the discovery of the two Americas, and the passage to India by the cape of Good Hope, by creating wants unknown till then, established so many points of contact between the nations, who were invited to the feasts of blood given by the new world to the ancient, by the east to the west, that, to put an end to their collisions, certain rules were admitted among them; and if the law thus constituted had for its basis at first the sacrifice of the believer by the christian, of the uncivilized by the civilized man, it lost by degrees its savage exclusive-

ness, and, generalizing itself, was forced to yield to the natural necessity, which leads all men to acknowledge a common origin, as well as to involve themselves in one and the same destiny.

However this may be, the chain of time cannot be broken without danger, and each subsisting civil society, with its institutions, its private laws, its manners (the result most frequently of the influence of climate), its culture, and its industry, must regulate its relations with other societies, according to the conditions of its existence, political and physical. Hence the law of nations, public law, international law, *jus gentium*, *jus publicum*, *jus civitatum*, words frequently taken in the same acceptation, and, upon the value, the signification, and the extent of which, authors are very little agreed.

In fact, some authors confound the law of nations with natural law: *neque vero hoc solum natura, id est iure gentium* (Cicero, *de officiis*); or call it the natural law of states, in contradistinction to the natural law of man (see Hobbes, *de civ.* and Puffendorf): others distinguish according as it has no other foundation than that natural law, or has for its base that law modified by the will tacit or expressed, and denominate it, in the first place;—natural law of nations (Klüber);—universal public law (Martens);—internal and necessary public law (Vattel);—necessary and universal law of nations, obligatory by itself (Burlamaqui);—natural and necessary law of nations (Grotius);—and, when this law is principally supported on the will, tacit or expressed, they denominate it;—positive law of nations (Klüber);—positive and particular public law (Martens);—external, positive and particular public law,—law of nations, arbitrary and of liberty (Burlamaqui);—voluntary law, dividing itself into divine voluntary law, and human voluntary law, (Grotius);—and, finally, subdividing this second branch of the law of nations, the greater number of the publicists class

it into conventional and customary law; and even Schmalz, whilst he acknowledges an ethical law, admits only the conventional and customary law as the basis of the law of nations.

In the midst of these theories, there is one general idea, which pervades them all; and we shall accordingly define international law, as *the law determining the relations of states among themselves, regulated by the natural law modified by the human will.*

Nations, considered abstractly, are not in fact, engaged among themselves by contracts similar to those which unite individuals of the same civil society, inasmuch as they do not acknowledge any superior human power, which can command them, and prescribe to them one and the same rule.

From this absence of a superior human law, obligatory on nations, it results, that their relations have their entire source in the natural law, modified by the institutions of each nation; for, as Bacon says: "There are in nature sources of justice, from whence all civil laws flow, like rivulets; and, as waters become tinged and impregnated by the different soils, through which they pass, so the civil laws vary with the regions and the governments of different countries, though arising from the same sources."

Thus, international law, changeable like human thought, following it in all its progressive developments, has enlarged like it and cannot be reduced to rules in the nineteenth century, as in the anterior periods of the history of the world.

#### GENERAL PRINCIPLES.

Nations, in regard to one another, are nothing more than moral persons, held to the same social duties as men. Under this relation, the law of nations may be considered as the civil law of the universe, and each nation as forming a citizen; that which one man owes to other men, one nation

as such owes to other nations; and, equally subject to the natural law, liberty and sociality are also the foundations of the existence and relations of nations.

From the liberty of nations, arise their *independence* and their *equality*.

From the sociality of nations, arise *justice* and the *offices of humanity*.

Independence, which constitutes the dignity and the absolute superiority of a nation, attributes to it the right of enjoying the liberty which is derived from nature, without being disturbed by any other society in this enjoyment, and the right of choosing for itself the social form which is the most in relation with its wants, its security, and its preservation.

Equality gives to all civil societies the same rights and imposes upon them the same duties, whatever may be their extent and their power. "It is in virtue of this right, that each sovereign state may require that no other state should arrogate to itself in their mutual relations rights more extended than those of which it itself enjoys, nor free itself from any obligation, by the performance of which they would be advantaged; sovereign states enjoy a moral and free personality; and each among them may lay claim to all the rights, which are derived from this personality; their rights are consequently equal; for, as the worm and the ant are properly numbered among animals, as well as the elephant, so the right of government of three families makes a republic, as much as that of a great seignory, and the seignory of Ragusa is not the less a republic, than that of the Turks or of the Tartars; and, as in the enumeration of houses, a humble dwelling is reckoned, as well as the greatest and richest house of the city, so a little king is as much a sovereign, as the greatest monarch of the earth."<sup>1</sup>

Justice, which is the foundation of every thing,—of all

<sup>1</sup> Bodin: *Republique*, liv. i. ch. 2.

intercourse,—constrains every civil society to respect the rights of other societies, and to render to them all that which is their due.

The offices of humanity, which are no other thing than those aids, those duties, to which men are obliged, one towards another, in virtue of their being formed to live in society, oblige civil societies to aid one another and to work simultaneously for the natural end of society.

But nations, divided by their manners, their religious beliefs, as much as by their political and civil institutions, would find in their independence and their equality, an inexhaustible source of conflicts, and an obstacle to the intercourse of humanity, if natural liberty, the foundation of this independence and of this equality, were not tempered by sociality and the duties which result from it.

Some writers, unable to arrive at a just position of these different elements, or deterred by the doubts of their existence, to which the facts of history so frequently give rise, have gone so far as to deny the natural liberty of man, and to take for their basis a fatalism or materialism, which can only lead to the destruction of free will, that is to say, of consciousness.

From the just equilibrium of liberty and sociality, there result certain general principles, which pervade and govern the relations of nations.

These fundamental maxims are far from being all written, except in the heart of man by the hand of God: *Quis legem naturalem in cordibus hominum scribit, nisi Deus?*<sup>1</sup>—but nations could not depart from them, without departing from the first conditions of natural society, nor withdraw themselves from their influence, without being unmindful of their origin and their destiny; for as they ought all to march towards the same end, by removing more and more the bar-

<sup>1</sup> St. Augustin: *Serm. Domini in monte*, lib. ii.

riers which still separate them, they ought to study the institutions of one another, in order to make them conform according to the laws of universal citizenship.

It is toward this end, that the human understanding impregnated by the love of its like, and enlightening itself by its own history, is constantly gravitating.

We must be careful, however, not to confound these general principles with the simple usages of nations, which are given by many, as the source of the law of nations, whereas the first principles are founded on the law, which the different publicists above quoted denominate necessary, universal, obligatory.

To admit usage as the foundation of a law is to make the law depend upon the usage, and upon the will which submits itself to it; but the general principles, with which we are occupied at this moment, comprehend at the same time the law, the usage, and the will; thus, we acknowledge, generally, a law anterior and superior to the human will, and which presupposes the consent of all civilized nations, to certain fundamental rules of the natural society.

“ *Quia omnis lex humana mutabilis est, et defectum ac errorem pati possit, ergo supponit necessario aliquam legem immutabilem per quam stabiliatur et quasi mensuretur, ut per conformitatem ad illam recte fiat, quæ non est nisi lex æterna.* ”<sup>1</sup>

These principles are those, which the German authors describe by the terms *philosophic law*, or the *metaphysics of law*.

These principles are also those, which the commissioners, charged in the year VIII with a revision of the civil code of France, formulated in the following disposition, which they proposed as the leading principle of their great work: “ *There exists a law, which is universal and immutable,*

<sup>1</sup> Suarez: *Tractatus de legibus ac deo legislatore*, lib. ii. ch. 1.

'and the source of all positive laws; it is nothing but the natural reason, in so far as it governs all men."

Finally, these principles, "a ray of the divinity descended upon man,"<sup>1</sup> fix the limits of liberty, of sociality, of the empire of humanity, and consequently of the sovereignty to which they give life.

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### ART. III.—BIOGRAPHICAL SKETCH OF WILLIAM STOUGHTON.

WE give below a brief sketch of one of the early judges of the supreme court of Massachusetts; and, as opportunity may permit, similar sketches of other members of that court may be expected. The sketches, however, must be exceedingly brief, since the materials, from which to fill up the detail of their lives or characters, are not accessible; and even the names of many of the judges have been preserved only in the records of their judicial proceedings, and are known to the patient antiquary alone.

William Stoughton was born at Dorchester in 1631. He was the son of the distinguished Israel Stoughton, who was the commander in chief of the colony forces in the Pequod war, and afterwards held a colonel's commission in the parliamentary army in England.

He was graduated at Cambridge in 1650, and was educated for the ministry. After finishing his education here, he went to England and obtained a fellowship in the university of Oxford. While in England, he preached for some time in the county of Sussex, and after his return to Massachusetts in 1662, continued to pursue his profession, although he never was settled over any church. He was an eminent and successful preacher, and in 1668 preached the annual election sermon, which was pronounced, at the time,

<sup>1</sup> De Ferriere : *Prolegomene sur la Coutume de Paris.*

to have been "among the very best delivered on that occasion." The title of this sermon was, "New England's true interest not to lie."

In 1671, upon being elected one of the assistants, he discontinued preaching, and from that time became an active public officer, being re-elected from year to year as an assistant, until the dissolution of the charter in 1686. In 1677, he was the colony agent in London, and upon the revocation of the old charter, and the appointment of Dudley as president of New England, he was commissioned as deputy president, and one of Dudley's council.

In July, 1686, he was placed at the head of the several courts in the colony, by an order of the president and council, which office he held until the arrival of Andros.

He was named in the commission of Andros, as one of his council, which office, unfortunately for his popularity, he accepted, and thereby lost the confidence of the people, while he was unable to obtain that of the tyrant he was content to serve.

He was, however, continued upon the bench under the new organization of the courts under Andros, but in a subordinate place, as Dudley, the late president, was made the chief justice.

Upon the breaking out of the revolution, which deposed Andros, the name of Stoughton is found at the head of those, who demanded of the governor a surrender of the government, and he became one of the council who assumed the administration, until the people could act upon the subject. The old charter was then resumed, and continued to be the form of government until 1691, when the charter of William and Mary was granted, and during this interval, Stoughton had not so far regained his popularity as to be elected one of the assistants. Under the new charter he was appointed the first lieutenant governor of the province, and from that time till his death, was constantly in the government, and during a part of the time, at the head of it.

He certainly must have possessed no ordinary degrees of supple shrewdness as a politician, to sustain himself in office under administrations, so opposed to each other in form and principle, as that of the popular elective constitution of the old charter, the arbitrary and tyrannical viceroyalty of Andros, and the moderate but mixed powers delegated by the new charter to the royal governor.

Governor Phipps arrived here in the midst of the excitement and alarm on the subject of witchcraft, and being himself a full believer in the existence of that crime, without waiting for a meeting of the popular branch of the government, by whose aid alone, according to the charter, courts could be established, he constituted a court of oyer and terminer, for the express purpose of trying those charged with witchcraft, and placed lieutenant-governor Stoughton at the head of this commission. He was a sincere believer in the existence of the crime he was appointed to investigate, and although honest in his convictions of duty, the unfortunate subjects of his jurisdiction had little cause to congratulate themselves upon the manner in which he executed his commission. He was assiduous in his endeavors to detect and punish the offenders, and in so doing prostituted the forms of justice to a series of judicial murders, unparalleled in our history.

In 1692, the superior court under the charter was organized, and Mr. Stoughton was made the chief justice, while he retained his offices of lieutenant governor and counsellor. In 1694, upon governor Phipps leaving for England, he became the acting governor and commander in chief of the province troops, and held this place till the arrival of lord Bellamont, in May 1699. Lord Bellamont left the government in 1700, and Stoughton again became the acting chief magistrate, and continued such till his death, July 7, 1701.

How he was able to perform the duties of his various offices with any degree of consistency, is not altogether appa-

rent. No other chief justice of the court was appointed during his life, and he must have held the offices of acting governor, commander in chief, counsellor and chief justice, at the same time; the first by appointment from the king, the second by election of the people, and the last by appointment of the governor and council. He died a bachelor, and atoned for the bigotry of his opinions in life, by his benefactions to the cause of literature at his death. He was the founder of "Stoughton Hall," which he erected for the use of Harvard college in his life time, and left to that college by his will, a further donation of a thousand pounds.

He was a well educated man, and notwithstanding his bigoted notions upon some subjects, was a discreet magistrate, and so far as honesty of intentions extend, an upright judge. He possessed great influence in the colony, and through a long life, took a leading part in the administration of its affairs.

His death was greatly lamented, and he was buried "with great honor and solemnity, and with him much of New England's glory."

An epitaph in Latin upon his tomb stone, records his virtues, and is still legible in the church-yard of Dorchester, where he lies buried.

E. W.

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#### ART. IV.—THE REQUISITES TO DOWER, AND WHO ARE CAPABLE OF IT.

To the consummation of the title to dower, there are three requisites; marriage, seisin of the husband, and his death;<sup>1</sup> for it is a maxim of law, *ubi nullum matrimonium ibi nulla dos.*

<sup>1</sup> Co. Litt. 31. a.

Dower attaches upon all marriages not absolutely void, and existing at the death of the husband ; it belongs to a wife *de facto*, whose marriage is voidable by decree, as well as to a wife *de jure*. It belongs to a marriage within the age of consent, though the husband dies within that age. Although a woman cannot consent before twelve years of age, nor a man before fourteen, yet this inchoate and imperfect marriage (from which either of the parties may at the age of consent disagree), shall entitle the wife to dower ; therefore it is accounted in law, after the death of the husband, *legitimum matrimonium quoad dotem*<sup>1</sup>. It has been stated, that though a marriage be voidable, yet if it be not avoided in the life-time of the parties, it cannot be annulled after ; and if a marriage *de facto* be avoidable by divorce, whereby the marriage might have been dissolved, and the parties freed *a vinculo matrimonii*, yet, if the husband die before any divorce, then (for that it cannot be annulled), the wife *de facto* will be endowed.<sup>2</sup>

A woman married in Scotland, not in evasion of the laws of England, is dowable of lands in England, and the validity of such marriage is triable by a jury.<sup>3</sup> The plea in this case was *ne unques accouple*, and it was held that the replication need not state by way of venue, that the marriage was consummated in any place in England. In actions for dower, the fact of marriage was not tried by a jury, but only the bishop's certificate upon the plea of *ne unques accouple in loyal matrimony* ; because the direct jurisdiction, in questions concerning the legality of marriage, belonged to the ecclesiastical courts, and the sentences of those courts on this head, were in general conclusive to the temporal courts.<sup>4</sup> In *Ilderton v. Ilderton*, the marriage having been celebrated out of any diocese, could not be inquired into and certifica-

<sup>1</sup> 1 Inst. 36 a. 1 Cru. Dig. 121.

<sup>2</sup> 1 Inst. 336. 1 Cru. Dig. 164.

<sup>3</sup> *Ilderton v. Ilderton*, 2 H. Bl. 145.

<sup>4</sup> *Robins v. Crutchley*, 2 Wilson, 122.

ted by any bishop—if therefore, in that case, a trial by jury were denied, there would be a failure of justice.

The further discussion of this requisite to dower would be more appropriate to an article upon the law of marriage, and we pass to the second requisite.

The second circumstance required to the existence of dower is, that the husband should be seized, sometime during the coverture, of the estate whereof the wife is dowerable. The kind of seisin necessary to the consummation of dower, is different from that requisite in courtesy. In the latter case, there must be a *seisin in fact*; for if the wife had only a *seisin in law*, the husband could not be tenant by the courtesy, because it was his own fault that he did not enter upon the lands descended to her. But there is no necessity for a *seisin in fact*, to entitle the wife to dower; a *seisin in law* is sufficient; otherwise it would be in the husband's power, either by his negligence or his malice, to defeat his wife of that subsistence, after his death, which the law has provided for her; since she cannot enter to gain a seisin in her own right, as her husband may do in lands descended to her, in order to entitle himself to courtesy.<sup>1</sup>

Where the ancestor dies seised, and the heir being married dies without making an actual entry on the lands, his widow shall, notwithstanding, be endowed; for by the descent of the land upon the heir, he acquired a seisin and freehold in law, though not in deed. It would be the same as if, soon after the death of the ancestor, a stranger had entered on the land and abated; for, between the death of the ancestor, and the entry of the abator, there was a space of time during which the heir had a *seisin in law*. If, however, the heir had married after the entry of the abator, and had died without making an entry, his widow would not be entitled to dower, because the *seisin in law*, which he had acquired upon the death of the ancestor, was divested

<sup>1</sup> 1 Inst. 31 a; Perk. 366; 2 Saund. 45, (n. 5.)

by the abatement before the marriage; so that the heir had neither a seisin in law nor in deed, during the coverture.<sup>1</sup>

Where lands are conveyed to a married man, by a deed deriving its effect from the statute of uses, his wife will be entitled to dower, though the husband does not enter; because, by the operation of that statute, a seisin in deed is transferred. If a man makes a lease for life, reserving rent to him and his heirs, then marries and dies, his wife shall not be endowed of the reversion, because there was no seisin in deed, or in law, of the freehold; nor of the rent, because the husband had but a particular interest therein, and no fee-simple. But if a man makes a lease for years, reserving rent, then marries and dies, his wife shall be endowed, because he continues to be seised of the freehold and inheritance.<sup>2</sup> Nor is it necessary that the husband should die seised; for being seized at any time during coverture suffices.<sup>3</sup>

If a person devises lands to his executors for payment of his debts, and after his debts are paid, to his son in tail, and the son marries, and dies before the debts are paid; his wife shall have dower, because the estate of the executors is only a chattel interest, and the freehold vested in the son, on the death of his father. But the wife's dower will not commence till the debts are paid.<sup>4</sup>

A wife shall be endowed where the husband had a seisin in law, as well as where he had an actual seisin; and therefore, if after a descent of land the husband dies before entry, his wife shall be endowed. So a wife shall be endowed, though the seisin did not continue till the death of the husband; as, if a man seised in fee takes a wife, and then sells or aliens his lands to another and his heirs. A wife shall also be endowed, though her husband be evicted by an elder title, after cesser of the eviction: as if the grandfather

<sup>1</sup> Litt. § 448; Plowd. 371.

<sup>2</sup> 1 Inst. 32, a.

<sup>3</sup> 2 Saund. 45, n. 5.

<sup>4</sup> 2 Vern. 404; 1 Inst. 41, a.

enfeoffs the father, and afterwards the wife of the grandfather recovers dower from him, and dies ; the wife of the father shall be afterwards endowed of the same land. So, if land descends to the father, who dies, and his wife is endowed ; if the wife of the grandfather recovers her dower against her, and afterwards dies, the wife of the father shall have the land after her death.<sup>1</sup> So the wife shall be endowed, where the estate of the husband is evicted by covin.<sup>2</sup>

Coke lays it down, that, of a seisin for an instant, a woman shall not be endowed ; which Blackstone explains thus ; the seisin of the husband for a transitory instant only, when the same act which gives him the estate conveys it also out of him again (as when by a fine, land is granted to a man, and he immediately renders it back by the same fine), such a seisin will not entitle the wife to dower, for the land was merely *in transitu*, and never rested in the husband ; the grant and render being one continued act.<sup>3</sup> He adds, if the land abides in the husband for the interval of but a single moment, it seems that the wife shall be endowed thereof ; and cites a singular case, where the father and son were both hanged in one cart, but the son was supposed to have survived the father by appearing to struggle longest ; whereby he became seised of an estate in fee by survivorship, in consequence of which seisin, his widow had a verdict for her dower.<sup>4</sup>

Sir Joseph Jekyll has also said that a woman is not entitled to dower out of an instantaneous seisin.<sup>5</sup>

The decisions in this country are to the same effect. Thus, where one conveys lands to the husband in fee, who, at the same time, by a deed of the same date, mortgages the land to his grantor, the wife of the grantee cannot have dower ; for this is one transaction. The seisin is but for an

<sup>1</sup> Co. Litt. 31 a. b. Ib. 32 a.

<sup>2</sup> 2 Inst. 349.

<sup>3</sup> 2 Bl. Com. 131.

<sup>4</sup> Cro. Eliz. 503.

<sup>5</sup> Sneyd v. Sneyd, 1 Atk. 442 ; See Amcotts v. Catherich, Cro. Jac. 615.

instant; since by the same act, or at least the same transaction, by which the husband acquired the seisin, he parted with it again.<sup>1</sup> And where the husband received a conveyance in fee, and at the same time mortgaged the estate in fee to a third person for the purchase money, and the right of redemption was afterwards foreclosed, it was held that the wife was not entitled to dower, because the seisin was but for an instant.<sup>2</sup>

When the seisin of the husband is instantaneous, or passes from him *eo instanti* that he acquires it; his widow is not entitled to dower.<sup>3</sup> So, where land is conveyed to the husband during coverture, who at the same time executes a mortgage to the grantor to secure the consideration money, the seisin of the land is but for an instant in the grantee, and is immediately re-vested in the grantor, and consequently, the widow of the grantee cannot claim her dower in the premises.<sup>4</sup>

But where a man has the seisin of an estate, though for an instant, beneficially for his own use, his widow shall be endowed; where the husband is the mere instrument for passing the estate, although there may be an instantaneous seisin, the widow shall not be endowed.<sup>5</sup>

A mere transitory seisin of a husband of a tract of land, for the purpose of re-conveying by way of mortgage, will not at common law entitle the wife to dower.<sup>6</sup>

Where the husband takes a conveyance of land, and immediately mortgages the same to a third person to secure the payment of the consideration, the same having been paid by the mortgagee in pursuance of a previous agree-

<sup>1</sup> *Holbrook v. Finney*, 4 Mass. 568.

<sup>2</sup> *Clark v. Munroe*, 14 Mass. 351.

<sup>3</sup> *Stow v. Tift*, 15 Johns. 458.

<sup>4</sup> *Ibid.*

<sup>5</sup> *M'Cauley & al. v. Grimes*, 2 Gill. & Johns. 318; *Reed v. Morrison*, 12 Sergt. & Rawle, 21; *Smith v. Eustis*, 7 Greenl. 41; *Griggs v. Smith*, 7 Halst. R. 23; *Holbrook v. Finney*, 4 Mass. 561.

<sup>6</sup> See cases just cited; & *Clark v. Monroe*, 14 Mass. 351.

ment between all the parties; the conveyance and mortgage will be considered as parts of the same transaction, and the husband will not have such a seisin of the estate, without redeeming the mortgage, as will entitle the wife to dower.<sup>1</sup>

In regard to the third requisite to dower, the death of the husband, it will not be necessary to expatiate. It has been said, that nothing but the natural death of the husband will give a title to dower; but there are authorities to show, that in England, banishment by abjuration or by parliament, which is a civil death, will have the same effect.<sup>2</sup>

It seems to have been the old law, that, where it could not be made to appear positively that the husband was dead, as where he was absent beyond seas, and no intelligence of him could be obtained, the wife might recover dower conditionally, that if he did return from beyond seas, she should render back her dower to the feoffee of the husband without suit, and receive the profits in the mean time.<sup>3</sup>

In Maine, the death of the husband is not, in all cases, a prerequisite to dower; for by the act regulating divorces, when the divorce is for the cause of adultery committed by the husband, the wife, *in addition to her dower*, to be assigned her in the lands of her husband, in the same manner as if such husband was naturally dead, &c.<sup>4</sup> This statute is substantially taken from that of Massachusetts, in which a similar provision is found.<sup>5</sup>

The supreme court of that state have decided, that the statute applies to divorces decreed after its passage, whether the adultery was committed before or after the date of the statute. It was also determined, that the court will not assign dower upon a libel, but the claimant must pursue the

<sup>1</sup> See cases just cited; & *Clark v. Monroe*, 14 Mass. 351.

<sup>2</sup> *Co. Litt.* 33 b; *Jenk. Cent.* 1 case 1.

<sup>3</sup> 8 *Petersdorf's Abr.* 329 in note, Am. ed.

<sup>4</sup> 1 *Maine Laws*, ch. 71, § 5.

<sup>5</sup> *Stat.* 1785, ch. 69, § 3.

same remedy as if the husband were dead. Both statutes provide that dower shall be assigned to the wife in the lands of the husband; the same phraseology is found in each; and the courts in Massachusetts held, that the provision embraced all the lands of which the husband had been seised at any time during the coverture.<sup>1</sup>

Who are capable and incapable of being endowed? All women who are natural-born subjects, and have attained the age of nine years, are, by the common law, entitled to dower, although their husbands should be but four years old. If a man marries a woman who is only seven years old, and afterwards alienates his land, and the wife attains the age of nine years, and then the husband dies, she shall be endowed. For though she was not absolutely dowable, at the time of her marriage, yet she was conditionally dowable, if she attained the age of nine years, before the death of her husband.<sup>2</sup> So, a wife shall be endowed, though the husband was under the age of nine; or though the wife was above the age of one hundred years; so that by possibility she could not have issue.<sup>3</sup> And though a wife could not have dower by the common law, if she were under the age of nine years at the death of her husband; yet she might have dower, *ex assensu patris*, or *ad ostium ecclesiae*, before such age.<sup>4</sup>

Every wife regularly shall be endowed; though she was a *nief* before marriage;<sup>5</sup> but she must be the actual wife of the party at the time of his decease.

The wives of particular persons are also entitled to dower; as the wife of an *abator*, or *disseisor*, or *discontinuuee*; or tenants in common, or *coparceners*; for a *seisin* of the freehold and inheritance, in any particular share, is suffi-

<sup>1</sup> *West v. West*, 2 Mass. 223; *Smith v. Smith*, 13 Mass. 231; *Davol v. Howland*, 14 Mass. 219.

<sup>2</sup> 1 Inst. 33 a.

<sup>3</sup> Co. Litt. 33 a. 40 a; 1 Rol. 675, l. 11

<sup>4</sup> Co. Litt. 37, a.

<sup>5</sup> Ib. 31, a.

cient to confer a title of dower to the extent of the share of each tenant.<sup>1</sup> A queen consort, though an alien, is entitled to dower by the law of the crown.<sup>2</sup>

It was formerly held that the wife of an idiot might be endowed.<sup>3</sup> But Blackstone is of opinion, that the law would be otherwise now, on the ground of the decision in Morrison's case, *coram Delegates*, in 1745, that an idiot, being incapable of consent, cannot contract marriage. It has been doubted, whether it was not necessary to have a sentence of the ecclesiastical court, declaring such marriage void.<sup>4</sup>

By the ancient law the wife of a person attainted of treason or felony, could not be endowed; this law was mitigated by statute, but a subsequent statute revived this severity against the widows of traitors, who are now barred of their dower (except in the case of certain modern treasons relating to the coin), but not to the widows of felons.<sup>5</sup> But if the wife was attainted for felony, if she was afterwards pardoned before the death of her husband, she should be endowed.<sup>6</sup> So, if the husband was attainted for felony, trespass, *præmunire*, or heresy; or if he were a villain to a common person, if he died before the entry of his lord, or if he were attainted for treason, after the attainer reversed by error, the wife shall be endowed.<sup>7</sup>

The rigor of the ancient feudal law, says professor Stearns, deprived the wife of an attainted traitor or felon of her dower. But this barbarous policy of ancient times, which attempted to prevent political or other offences, by involving the near connexions of the offender in the punishment of his crimes, it has been well observed, is abhorrent to the genius and character of our judicial institutions. For the small number of felonies in our criminal code, specific punishments

<sup>1</sup> Co. Litt. 31, a. 371; Litt. s. 45; 1 Roll. Abr. 676; 3 Lev. 84.

<sup>2</sup> Co. Litt. 31, b. <sup>3</sup> Ib. 30, b.

<sup>4</sup> 2 Bl. Com. 130; 1 V. & B. 140.

<sup>5</sup> Co. Litt. 31, a; 2 Bl. Com. 130; Crabb's Hist. of Com. Law, 490.

<sup>6</sup> Co. Litt. 33, a. <sup>7</sup> Ib. 33 a. 31, a; More, 639.

are provided by statute; among which punishments are neither corruptions of blood, nor forfeiture of dower. The same character of mildness is a distinguishing feature, not only in the laws of the nation, but in those of most of the individual states. And it cannot be improper to remark here, to the honor of the founders of our state sovereignty, that these humane principles have not been lost sight of in times of the greatest political excitement. For even the widows of those, who were denounced by the legislature during the war of the revolution as conspirators, and whose estates were declared forfeited to the government, were not deprived of dower. And the same principle has been recognised, under a similar law of some of the other states.<sup>1</sup>

The case of *Wells v. Martin*, decided in South Carolina,<sup>2</sup> was an application on the part of Mrs. Wells, for her dower in sundry houses, of which her husband was seised in his life-time, and during her coverture. It was admitted, that Mr. Wells in his life-time had joined the British standard, during the revolutionary war, and had adhered to the enemies of America; in consequence of which, his person was banished from the state, and his estate confiscated by an act of the legislature; and that the defendant had purchased one of the lots of land. He therefore disputed her claim of dower in the house and lot he had purchased, which brought the question fully before the court, whether, under these circumstances, she was entitled to her dower or not. The court after considering the question, were unanimously of opinion, that Mrs. Wells was not deprived of her right to dower, either by common law, or by the act of confiscation.

In New York, it was held, that attainder of the husband under the act for the forfeiture and sale of the estates of persons who have adhered to the enemies of the state, passed October 22, 1779, does not bar the wife's right of dower.<sup>3</sup>

<sup>1</sup> *Stearns on Real Actions*, 287; *Act of Mass.* April 30, 1779; *Sewall v. Lee*, 9 Mass. 363; 1 *Johns. Cas.* 27; *Wells v. Martin*, 2 Bay, 20.

<sup>2</sup> 2 Bay, 20.

<sup>3</sup> *Palmer v. Horton*, 1 *Johns. Cas.* 27.

So, the act limiting the period of bringing claims and proving charges against forfeited estates, passed the 29th of March, 1797, does not extend to or bar the claims of the widows of persons attainted, for their dower, in the estates forfeited and sold by the commissioners of forfeitures.<sup>1</sup>

Alien women are not generally capable of acquiring dower, for the same reason, that an alien man cannot be tenant by the courtesy. But by the *lex coronæ*, an alien queen is entitled to dower. And in consequence of a petition from the commons, an act of parliament was made in 8 Henry V, not printed among the statutes, by which all alien women, who from thenceforth should be married to Englishmen, by license from the king, are enabled to have dower, after their husband's death, in the same manner as English women.<sup>2</sup>

If an alien woman be naturalized by parliament, she then becomes entitled to dower, out of all the lands whereof her husband was seised during the coverture. Where an alien woman is created a denizen, she becomes entitled to dower, out of all the lands whereof her husband was seised at the time she was created a denizen, but not out of any lands whereof he was seised before, and which he had aliened.<sup>3</sup>

The wife of an alien is not entitled to dower.<sup>4</sup>

Aliens, by the common law, cannot hold lands in England, and consequently are excluded from the privileges of courtesy and dower; and this ancient principle of the law has been generally, perhaps universally, adopted in this country. In Massachusetts, by the statute of 1812, ch. 94, this legal incapacity of the wife (who was an alien at the time of her marriage) to recover dower, has been removed.<sup>5</sup>

The common law has been modified in various parts of this country. Thus, in Maryland, an alien widow, who married in the United States, and resided here when her

<sup>1</sup> *Hogle v. Stewart*, 8 Johns. 104.    <sup>2</sup> 1 *Cruise's Dig.* tit. *Dower*, sec. 25.

<sup>3</sup> 1 *Inst.* 31 b. 33 a. 13 *Rep.* 23.    <sup>4</sup> *Co. Litt.* 31 a.

<sup>5</sup> *Stearns on Real Actions*, 286; *Sewall v. Lee*, 9 *Mass.* 363.

husband died, was admitted to dower.<sup>1</sup> In New York, while the general rule is admitted, that the alien widow, even of a natural born citizen, is not entitled to dower in her husband's lands, yet, under the statute of 1802, the widows of aliens, entitled by law to hold real estate, are held to be dowable. This reasonable construction of the act of 1802, has been confirmed by a general statute provision, declaring that the widows of aliens, entitled at the time of their deaths to hold real estate, may be endowed thereof, provided the widow was an inhabitant of the state at the time of the death of the husband.<sup>2</sup>

In *Kelly v. Harrison*, it was held, that the wife of an alien, who was herself an alien, may be endowed of lands of which her husband was seised before the declaration of the independence of the United States.<sup>3</sup>

The disqualification of alienage was removed, by denization or naturalization; but as to the effects of these two modes there is a distinction; in the former case, if the husband aliens the land before the wife is denized, she will not be entitled to dower; because her capacity and possibility to be endowed come by the denization.

We have already seen, that if an alien be naturalized, she will be entitled, not only to dower out of the lands of which the husband was seised *after* the naturalization, but of those also which he had aliened *before*. But where an alien woman is created a denizen, she can have dower, only out of those lands of which the husband was seised, *at or after* the time when she was created a denizen.

No such distinction is known in this country; for our laws do not recognise the grade between an alien and a citizen, which is called denizen, in England.

<sup>1</sup> *Buchanan v. Deshon*, 1 Harr. & Gill, 280.

<sup>2</sup> 4 Kent's Com. 36; *Sutley v. Forgay*, 1 Cowen, 89; 8 ib. S. C.; N. Y. Revised Stat. vol. i. 740, sec. 2.

<sup>3</sup> 2 Johns. Cas. 29.

In Connecticut, it has been decided, that the widow of a foreigner who was naturalized, who lived and died in that state, she ever remaining absent from her husband in a foreign country against his consent, was not entitled to dower in his estate.<sup>1</sup>

If a Jew born in England marries a Jewess also born in England, and the husband is converted to the christian faith and purchases lands, his wife shall not be endowed if she continues a Jewess.<sup>2</sup> By the statute 6 Richard II. st. 1, c. 6, it is enacted, that whenever any woman is ravished, that is, stolen, and afterwards consents to live with the ravisher, she shall be *ipso facto* disabled from having dower.

After all, it is very apparent, that the right of dower is favored and protected by the law; it is a right which the husband is not permitted to *defeat*, though he may *impair* it to a certain extent.

In the case of *Fosdick v. Gooding*,<sup>3</sup> chief justice Mellen admits that the husband, in his life-time, may, by his conveyance, in some degree *impair* the widow's right of dower, though he cannot *defeat* it; that is to say, if he should die, not having alienated any portion of his estate, his wife could legally be endowed *in solido*; but if he should convey his estate to four different persons, one distinct parcel to each, and die, the widow must demand and receive dower of the four different grantees, in four different parcels; and this may essentially *impair the value* of her dower, though not in any degree *lessen the proportion*. The case of *Porter v. Wheeler*,<sup>4</sup> seems to adopt and proceed upon this principle. It recognises the power of the husband to affect the widow's rights to a certain extent by his act of conveyance, and impair them by qualifying the mode of her enjoyment of them.

In *Perkins v. Little*, chief justice Mellen expressed a similar

<sup>1</sup> *Sistare v. Sistare*, 2 Root, 468.

<sup>2</sup> 1 Inst. 31, b.

<sup>3</sup> *Fosdick v. Gooking & al.* 1 Greenl. 46.    <sup>4</sup> *Porter v. Wheeler*, 13 Mass. 504.

opinion; the right of dower can never be taken away or impaired by any act of the husband; it is beyond his control, and is guarded by the law with care and vigilance.<sup>1</sup>

It may be remarked in this connexion, that although the widow is dowable by the common law of *all the real estate* of which the husband was seised during coverture with some exceptions not known in this country, and her right vigilantly guarded so that the husband cannot defeat or impair it by his own act, yet in some of the states of the union, she cannot be endowed of lands in a wild and utterly unproductive state. For this rule, several reasons are assigned:

1. That there are large tracts of uncultivated lands in this country owned by individuals who do not intend to effect their cultivation, but hold them for purposes of sale and speculation, or as a fund for their children; and if dower could be assigned in such estates, the views of those who purchase such property would be obstructed; and such an incumbrance would prove an impediment in the way of sale and transfer.

2. If the widow did not improve the land, the dower would be wholly useless; if she did improve it, she would be exposed to disputes with the heir, and to the forfeiture of her estate, after having expended her substance upon it.

3. It is well settled, that the dower of a widow is not to be assigned so as to give her one third of the land in quantity, but so that she may enjoy one third of the rents and profits or income of the estate. Now, of a lot of wild land, not connected with a cultivated farm, there are no rents and profits, and therefore the rule for the assignment of dower cannot be applied.

4. At common law, the right of damages for detention is incident to the right of dower; from which it may be in-

<sup>1</sup> *Perkins v. Little & al.* 1 Greenl. 151.

ferred, that there can be no dower in land, the detention of which can be no injury. The detention of wild land from the widow can form no subject for damages.

5. Dower out of such estates could be of no advantage to the widow; for as the heir has a right to the inheritance, in the same character as it was left by the ancestor, her estate would be forfeited if she were to cut down any valuable timber trees; and it might be considered waste, to cut down the wood and clear up the land.

6. Lands in a state of nature, in a rapidly increasing country, may be more valuable than under the sort of cultivation which a tenant for life might bestow upon them; and that the very clearing of the land for the purpose of getting the greatest crops with the least labor, which is all that could be expected from a tenant in dower, would be actually as well as technically, waste of the inheritance.

For these reasons, the supreme court of Massachusetts decided at Augusta, in 1818, that a widow is not dowable of land in a wild and uncultivated state.<sup>1</sup>

The next case was that of *Webb v. Townsend*,<sup>2</sup> where the land was in a state of nature, when the alienation took place, but when dower was demanded had become a cultivated farm, by the labor of the grantee and those who claimed under him. The husband was not seised during the coverture of any estate of which the widow could be endowed. But if it had been an estate of which she was dowable, and it had been increased in value by a grantee of the husband, her dower must have been assigned according to its value at the time of alienation. Accordingly the court held, that a widow is not entitled to dower in land, which was wild when alienated by the husband, but had been brought into a state of cultivation by the husband's grantee, at the time when dower was demanded.

<sup>1</sup> *Conner v. Shepherd*, 15 Mass. 157.

<sup>2</sup> *Webb v. Townsend*, 1 Pick. 20.

In *White and wife v. Willis*, the court decided that a widow is dowable of a lot of wild land, used by her husband in connexion with his dwelling-house and cultivated land ; that such being the facts in the case at bar, it was distinguishable from those previously decided, respecting dower ; they limiting the disallowance of dower to wild land, which is not used with the homestead or with cultivated land.<sup>1</sup>

In *New Hampshire*, a widow is entitled to dower in lands of which her husband was seised during coverture, if the lands were at the time, "in a state of cultivation," though yielding no net income ; and lands must be considered "in a state of cultivation," when they are not in their original state of nature, or, after being cleared and worked, have not reverted to a similar state.<sup>2</sup> In the case of *Conner v. Shepherd*, already cited, one of the main reasons assigned for refusing dower in wild lands is, that a tenant for life cannot derive any benefit from such lands without committing waste, and thus forfeiting her estate. What constitutes waste, is a question of some difficulty, both in *England* and in this country ; and sometimes depends on another unsettled question, what are timber trees ?<sup>3</sup> The law is not uniform in *England* and not strictly applicable here.<sup>4</sup> According to some of the cases, it is clear that a tenant for life may, to a certain extent, cut wood from waste lands, and derive considerable benefit therefrom, without incurring the charge of committing waste. Furthermore, it is not quite clear, that by subjecting the lands to cultivation, the

<sup>1</sup> *White et ux. v. Willis*, 7 Pick. 143.

<sup>2</sup> *Johnson v. Perley*, 2 New Hamp. 56.

<sup>3</sup> As to what constitutes waste and what are timber trees, see 15 Petersdorf's Abr., art. Waste.

<sup>4</sup> *Hastings v. Crunkleton*, 3 Yates, 261 ; *Findlay v. Smith*, 6 Munf. 134 ; *Jackson v. Brownson*, 8 Johns. 237 ; *Crouch v. Puryear*, 1 Rand. 258 ; *Jackson v. Sellick*, 8 Johns. 262 ; *Ballentine v. Poyner*, 2 Hayw. 110 ; *Perkins v. Cox*, 2 Hayw. 339 ; *Elliott v. Smith*, 2 N. H. 430 ; *Loomis v. Wilbur*, 5 Mason, 13.

tenant would in all cases be chargeable with waste.<sup>1</sup> The law of waste in the United States, being constructed to suit the condition of a new settled country, has not adopted the rigid rules which prevail in England; in Massachusetts a greater observance of the English rule as to what constitutes waste, prevails, than in the other states. The reader is referred to the American cases cited below, in addition to those already cited, as proofs of its variable character; which accommodates itself to the circumstances of the country.<sup>2</sup>

We will bring this article to a close, by extracting the sensible remarks of Sir Joseph Jeckyl, in the case of *Banks v. Sutton*.<sup>3</sup> "The relation of husband and wife, as it is the nearest, so it is the earliest, and therefore the wife is the proper object of the care and kindness of the husband. The husband is bound by the law of God and man, to provide for her during his life: and after his death, the *moral obligation* is not at an end, but he ought to take care of her provision during her own life. This is the more reasonable, as during the coverture, the wife can acquire no property of her own. If before her marriage she had a real estate, this by the coverture ceases to be hers, and the right thereto, whilst she is married, vests in the husband; her personal estate becomes his absolutely, or at least is subject to his control. So that unless she has a real estate of her own (which is the case of but few), she may, by his death, be destitute of the necessaries of life, unless provided for out of his estate, either by jointure or dower. As to the hus-

<sup>1</sup> *Governors, &c. of Harrow School, v. Alderton*, 2 B. & P. 87; *Hastings v. Crunkleton*, 3 Yates 261; *Jackson v. Andrews*, 18 Johns. 431; *Loomis v. Wilbur*, 5 Mason, 13; 1 Bingh. 382; 1 J. & W. 651; cited in *Conner v. Shepherd*, 15 Mass. 161, Rand's Ed. in note.

<sup>2</sup> *Den v. Kinney*, 2 Southard, 552; *M'Cracken's heirs v. M'Cracken's Exr's*, 6 Monroe, 342; *Owen v. Hyde*, 6 Yerg. 334; *Coombs et al. v. Young's heirs*, 4 Yerg. 218; *Williams v. Rogers*, 2 Dana, 374; *Wilson v. Smith*, 5 Yerg. 379; *People v. Alberty*, 11 Wend. 160; *Sergeant v. Towne*, 10 Mass. 303; *Padelford v. Padelford*, 7 Pick. 152.

<sup>3</sup> 2 P. Williams, 702.

band's personal estate, unless restrained by special custom (which very rarely takes place), he may give it all away from her; so that his real estate (if he had any), is the only *plank* she can lay hold of, to prevent her sinking under her distress. Thus is the wife said to have a *moral right* to dower."

F. B.

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#### ART. V.—PENAL LAW AND PENITENTIARY SYSTEMS.

*A Popular Essay on subjects of Penal Law, and on uninterrupted Solitary Confinement at Labor, as contradistinguished to Solitary Confinement at Night and Joint Labor by Day, in a letter to John Bacon, Esquire, President of the Philadelphia Society for alleviating the miseries of Public Prisons.* By FRANCIS LIEBER, Corresponding Member of the Society; Professor of History in South Carolina College. Mild Laws—Firm Judges—Calm Punishments. Philadelphia: Published by order of the Society, 1838.

FEW of our fellow-citizens have done so much to throw light on the subject of crime and punishment, as the author of this essay. He first made himself favorably known to the public, as a criminalist, by his translation of the work of Messrs. de Beaumont and de Tocqueville, on the penitentiary systems of the United States, to which he prefixed a learned and interesting introduction, and added many valuable notes. His next production was a letter on the relation of crime to education, which was reprinted in England, and has been very generally circulated.

The present essay, the author informs us, is to be considerd "as a forerunner of a systematic work on punition": but the immediate occasion of its publication was a request on the part of several of the author's friends, that he would

prepare and publish "an exposition of the advantages resulting from the Pennsylvania system" over the Auburn system of penitentiary punishment. His determination to comply with this request was quickened into action, by the remarks on page 59 of the Twelfth Annual Report of the Prison Discipline Society, relating to the new penitentiary at Columbus, Ohio, in which the writer impliedly, at least, seems to charge the large number of deaths in that institution during the preceding year, to the violence done to the nature of man, by "keeping him shut up in a solitary cell on the sabbath, and not suffering him to come forth and enjoy the soothing and healing influences of the sabbath school, the sanctuary, and the public worship of Almighty God."

Mr. Lieber first institutes an inquiry into the source of the "punitory power of the state,"—a subject, which, as he remarks, "has perplexed for so many centuries the ablest philosophers and inquirers into the dearest interests of society, from Aristotle to Kant, from Kant down to the latest times;" and, for this purpose, he reviews briefly some of the most prominent theories, which have been assumed as the basis for the right or obligation of a political society, to punish offenders against its laws. The theories, which he thus examines, are those of expiation,—necessity or expediency,—deterring,—special prevention,—warning,—contract,—correction or reform,—retaliation,—retribution,—and self-defence,—which last, however, resolves itself into that of necessity or expediency. None of these theories, in the opinion of the author, furnishes a solid basis upon which to establish the punitory power of the state. This power, however, exists. We find it in the idea of the state.

Man, by his very nature, must live in society; otherwise he cannot live as man; he cannot fully and appropriately develop his faculties; he cannot become that for which his maker has placed him on the earth. It is the right and duty

therefore, of each individual, in his character of man, to develop and exercise all his faculties, according to their proper sphere and function: but, as this right and duty belong equally to every other individual, it is plain, that the development and exercise of the faculties of each must be limited and restrained, in such a manner, as to admit of the same development and exercise on the part of every other. This is individual moral freedom. The existence of the state results from the social nature of man; it is not an artificial thing, made by man, that may or may not be adopted; but it is necessary, and therefore natural, grown and indispensable; and the object of it, or the idea on which it is founded, is to regulate and fix the individual moral freedom, which each man possesses as man,—as a rational and moral being,—placed in society and co-ordinate with others. The conduct of each individual towards others is consequently *the rule which he himself establishes for their conduct towards him*; and, it follows, that “every individual in the state must grant to others the right he claims for himself; if he interferes with the rightful state of others, he grants them the abstract right to interfere with his.” When one individual, in the exercise and development of his faculties, interferes with the doing of the same thing by any one or all of the others, he gives to each one or to the whole (which is the state) a right to set up the same interference as a rule for their conduct against him. This is the idea on which the abstract right of punishment is founded; but this abstract right is to be made use of, so far only as its exercise may be found necessary.

Mr. Lieber next proceeds to inquire how far it is necessary to make use of the abstract right of punishment; and, in considering this question, all the various objects before examined, such as protection, warning, reform, expediency, &c., from which it had been attempted to derive the “first punitive right of the state, come in as motives of punishment, or, in other words, as reasons, why we make use of the right

of punishment already existing." He then lays down certain characteristics, which punishment ought to possess, founded on the principles before ascertained, and in the theory of penal law, or which relate to human actions in general; and, by these examines and tests among other forms of punishment, more or less in use, those of apology, publicly asking pardon, fine, ridicule, censure, dishonor, unworthiness of public confidence, privation of privileges, degradation, distinction of dress, infamy, pillory, whipping, branding, infliction of pain otherwise than by whipping, simple imprisonment, the same with public labor, exile, transportation, maiming, death, and death with additional pains or infamy.

The result of this examination is, that imprisonment unites more of the desirable or necessary qualities, which punishment ought to possess, than any of the other forms. The residue of this interesting letter is devoted to a comparison of the relative advantages and disadvantages of the two systems of imprisonment, known respectively as the Pennsylvania and the Auburn. Mr. Lieber first states the important advantages, which the friends of the former system, among whom it is hardly necessary to inform our readers, he himself holds a distinguished rank, believe to be derived from it, together with its supposed disadvantages. He then considers the objections, which are urged against it, by the advocates of the Auburn system; and concludes by an enumeration of what he conceives to be the unavoidable disadvantages of the latter.

We have been greatly interested by this letter, not so much on account of its discussion of the several systems of penitentiary imprisonment, as for the profound, ingenious, and to us at least, new views, which it presents of the idea of the state and of the right of punishment. Disquisitions of this nature, and particularly in reference to criminal law, are almost wholly unknown, and perhaps are not likely to be appreciated, in this country; but we sincerely hope, that the

reception of this essay will encourage the author to prepare and publish a full and scientific exposition of his views on subjects of penal law.

L. S. C.

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#### ART. VI.—RULES OF EVIDENCE.

##### No. 10.—*Hearsay Evidence and Confessions or Admissions of the Party.*

HEARSAY evidence is that which comes through the lips of a deposing witness, who is assumed to have heard the facts to which he deposes, from some other individual, either the original percipient witness, or some one to whom such witness has related them. He vouches only for the accuracy of his narration, not for the truth of the facts narrated. The assumed statements of the supposed original percipient witness, (supposed we say, for there may not have been such witness) constitute the real evidence upon which the judgment of the court is based. The credit is given not to the deposing, but to the percipient witness, whose statements, when they constitute the grounds of the decision, are received not only as true, but as truly reported, although they are obtained without any of the ordinary securities for testimonial trustworthiness. An unseen, unheard, unsworn, unquestioned witness guides the mind and controls the judgment of the court. This testimony, from the necessity of the case, is essentially inferior to that of the original witness, delivered under the usual securities for truth.

The reported confessions or admissions of the party to a suit or process, are none the less *hearsay*, because they are the statements of such party. They are liable to the same deductions, they are infected with the same inherent defects, which are considered as weakening to a very great degree

the probative force of any other instance of hearsay. Hearsay as against another—it is none the less hearsay as against the party. The common law recognising it as the “first and most signal rule of evidence, that the best evidence of which the case is capable shall be given,”<sup>1</sup> the inquiry naturally arises, why secondary evidence, delivered without any of the essential tests and guaranties for truth, should be thus preferred to primary, delivered under and with every security known to the law; and why the *hearsay* confessions of the party are received against his interest, while the party who is supposed to have made such confessions, is excluded.

The reason assigned for this apparent anomaly is, that the confession of the party is the best evidence,<sup>2</sup> which can be given; and though the hardship of compelling the party to state facts against his own interest is a sufficient reason for excusing him, that hardship it is considered would vanish the moment similar statements of his are disclosed to the court through the lips of another. The real value of this testimony is to be considered.

In all cases of hearsay, the effective witness is the individual, whether party or not, whose supposed statements the narrating witness relates. The individual testifying is merely the conduit or pipe, through whose agency the impressions of some one else are conveyed to the court. The real proof is the hearsay statement, and the credit which the

<sup>1</sup> *Roscoe on Evidence*, 1.

<sup>2</sup> The confession of the party is the best evidence, *Norris's Peake*, 36 n.; *Hendrickson v. Miller*, 1 Rep. Cons. Ct. (S. C.) 296; and 2 Rep. Cons. Ct. (S. C.) 215. It is the weakest and most unsatisfactory testimony, 1 *Wend.* 625—662; 6 *Mur.* 136, &c. &c. Proof confessions are to be received with great caution, *Morehead v. Thompson*, 1 *Lou.* 286. The cases are about even. The oracle uttereth an uncertain sound. Its votaries receive with equal awe, the dubious and contradictory responses, from which the judicial soothsayer selects, as the pressure of the case may require; each being, for the time, the perfection of human wisdom.

testimony should receive, depends on such extraneous witness. In case of confessions, it is the party who testifies in his own cause against himself, without oath or examination by or before any competent judicial authority, and without the power of altering or explaining his testimony—thus affording another exception to the supposed inviolability of that rule of law, by which the party stands excluded.

Confessions are either judicial or extra-judicial—voluntary or involuntary—intentional or unintentional.<sup>1</sup>

Voluntary, intentional, judicial confession is when the party accused, without external influence or coercion, after being fully examined by the judicial authority, confesses his guilt with a knowledge of the use subsequently to be made of it, and of the adverse results which will ensue from his statements. Being uttered as and for confessions, they will be correct and complete, and if not correct and complete, judicial interrogation will supply all deficiencies; being heard by the judge, no error from misapprehension or misrecollection need exist, or if existing, it may be corrected on the spot. The intervention of a testifying go-between ceasing, they cease to be hearsay. Judicial confession, as known in the civil, is unknown in the common law.<sup>2</sup> Notwithstanding the great precautions which the civil law adopts to prevent false or erroneous confession, still the whole history of judi-

<sup>1</sup> Voluntary and intentional, and their opposites. The confession may be voluntary, there may be a perfect freedom from coercion, and yet no intention or expectation that what is said shall ever be used as an article of confessional evidence,—as casual street conversations, uttered with no design that they shall ever be used as confession, yet perfectly voluntary. So the confessions may be intentional, designed to be confessions, yet not voluntary. As confessions uttered upon compulsion, they are uttered as and for confessions, they are intentional, yet they may be obtained by force, and so far not voluntary.

<sup>2</sup> The examinations of prisoners by and before magistrates are by virtue of certain statute provisions in England. The only instance of judicial confession in the common law, is the case of the prisoner's pleading guilty upon his arraignment, upon which, as a matter of course, sentence is passed.

cial trials is replete with instances of the utter uncertainty of this species of testimony. Confessions, self-criminative of unreal, impossible crimes, at impossible times and places, have been again and again made, and the supposed guilty, because confessing, have been executed. The motives of such a course have been as various as the individual pursuing it. Melancholy, ennui, the wish to save a friend or relative—or to divert the attention of the judge from a real and greater to an unreal and less crime, a desire to please the officer of justice, the hope to lessen punishment—to obtain a removal from one person to another, are and will prove to have been motives sufficiently powerful to induce false confessions.<sup>1</sup>

Confessions, as they are ordinarily obtained in common law courts, are never in civil and but very rarely in criminal cases, made on the part of the individual whose confessions they purport to be, with the intention or expectation that they will ever be used as evidence. Were they so intended, were they meant to be what the relating witness reports them to be—in civil cases an admission of the rights of the adverse party and in criminal an acknowledgment of the guilt of the accused—it would rarely happen after such an open abandonment of one's cause, that the individual so

<sup>1</sup> The civil law adopts the greatest precautions to secure the rights of the prisoner confessing.

To constitute a perfect confession it must appear :

1. That the crime has been committed.
2. That the confession has been taken before a proper judge. Extra-judicial confession, though it may raise a presumption, yet does not constitute full proof.
3. That it be simple, clear, in plain terms, and voluntary.
4. That the information, obtained *aliunde* by the judge, agree with the confession.
5. That the special circumstances, stated by the party in his confession, be found on subsequent examination to be correct.
6. That the confession contain such circumstances, as the party, in case he were innocent, could by no possibility have known.—Vanderlinden's *Ins.* 362.

abandoning would be induced to sustain a defence, the non-existence of which he had admitted. They are ordinarily made accidentally and not with any intention of their ever being subsequently used in a court of justice. The confessions thus obtained, though unpremeditated and so far trustworthy, being mere casual remarks, may be incomplete to any supposable extent ; or, sufficiently complete for the purpose of their utterance, they may be utterly incomplete in relation to the whole, of which they constitute but an insignificant portion.

The confession extra-judicial,—involuntary,—unintentional, its subsequent judicial use and importance unimagined, its connexion real or imaginary with other facts unanticipated, it can hardly happen otherwise, than that the statements thus made should be deficient in clearness, correctness and completeness. Indistinct, incorrect, or incomplete—to the extent of such deficiency, error, and its unavoidable result, misdecision,—to the injury of the party making such statements, must ensue. All casually made confessions will ordinarily partake in a greater or less degree of these defects. In case of a conversation accidentally overheard, or entered into, in relation to any given subject matter, it not being foreseen for what purpose it may at some future time be used, the party speaking is not full and complete in his statements ; or being so in relation to the subject matter of the then present conversation, he may be incomplete in reference to the collateral bearing of his remarks upon something else, to which as a matter of confessorial evidence, they may be transferred. Made as the statements may be in relation to different objects and for different purposes, they may be true and the whole truth as far as the matter then under consideration is concerned—and yet not the whole truth as viewed in their subsequent, distorted connexion with other matters. The conversation too may be in relation to the cause in which they are used,

and being partial, incomplete, or defective, the omissions of true facts, the result of negligence or any other assignable cause, may be as dangerous to the cause of truth as the most perverse and deliberate mendacity.

To elicit the whole truth, requires skill, power, and adequate motive. Effective, successful interrogation is the work of labor, and will never be undertaken except when some duty requires it. The casual auditor, who afterwards becomes the narrating witness, without motive to put the necessary questions or power to compel an answer, is content to receive what may be offered. He never seeks to ascertain the whole. What is the whole or a part to him? Why should the accidental auditor of a narration, to him unimportant, assume the labors and duties of counsel or judge and cross-examine the individual with whom he is conversing?

But if there be interrogation, who will guarantee propriety of manner, integrity of purpose, and the requisite knowledge? The interrogator is whosoever he may be. His qualifications are as accidental as his person or his presence. His purpose is known only to himself—unknown it may be to the person interrogated. His object may be sinister—his questions captious<sup>1</sup> or ensnaring. How this process may be

<sup>1</sup> The German law, while permitting the necessary examinations of the prisoner, lays it down, that no questions either captious, (thereby meaning such as may involve the party in admissions, without his perceiving their tendency), or suggestive in their nature, are to be put to the prisoner, nay, the name of an accomplice or of any special circumstance connected with the fact but not yet proved, shall not be suggested to him, otherwise the confession so taken shall be of no effect. *Foreign Quarterly Review*, vol. viii. p. 298.

The examinations of the prisoner, however, are repeated so frequently, so long a time elapses between the commencement and termination of the process, as to appear almost incredible to one conversant only with common law process. The trial of Riembaur, a German priest, accused of a murder of almost unprecedented atrocity, was continued through a period of over four years, during which he underwent one hundred personal examinations, at each of which he protested his innocence, till on the hundredth, moved by the

conducted, can only be known from the lips of one, who, if dishonest, will be little likely to condemn himself. Not made judicially, the judicial power—that of examination—is abandoned to chance. The chance-examiner willing to undergo the labors of examination, how will he know that a crime, and if any, what, has been committed, when, where, and in what manner,—and thus unexpectedly assuming new duties, how will he be able to follow fraud or crime through all its circuitous meanderings? If, without the requisite information, and when will he obtain it, he attempts, he stumbles at the very threshold of his investigations. Attempting it, the power to enforce an answer is wanting. Accidental disclosures only are obtained. The will of the party bounds the limits of the information received.

The conversation at the time unimportant, but by subsequent events acquiring an unexpected importance—what motive has the narrating witness to note the precise words used. Of the ordinary street conversation, whoever attends with sufficient care to hear accurately the whole—or, hearing, makes the effort to remember. Without inducement, which, by the hypothesis there is not, what probability is there, that there will be the requisite care to understand, or if understood, that it shall be recollected, or if recollected, that it shall be accurately repeated. Language, though the best, is but an inadequate and imperfect means of conveying thought. Of any given conversation heard by different witnesses, the reported accounts vary. Yet if the exact language be not used, misconception arises. The purport, substance, tenor, or effect, as understood and recollected by one witness, will be different from it as understood by another, and neither convey the real meaning of the party. Where the intention is to remember the identical words used, as in the

serenity which another criminal who had confessed displayed on his execution, he confessed his guilt. The records of the proceedings in the case filled forty-two folio volumes. Ib.

act of committing to memory, there are few instances, where the object is accomplished by one perusal or one hearing of the words to be remembered. It is a process of labor, where remembrance is the design in view; but in all cases of casual conversations, there is no such design. The pretended recollection is rather the result of a process of reasoning or imagination than of distinct remembrance.

Had the supposed conversations been uttered for the very purpose of being reported as testimony, and heard by the witness with the intention of so reporting, the chance of exact and verbal repetition may be understood, by hearing any given sentence read, or conversation heard, and then attempting after a lapse of time to repeat the same as a set and appointed task. Even with the aid of memoranda made at the time, as in the case of notes taken by the court or by counsel, in the trial of a cause, complete accuracy is rarely attainable, it being found, that the notes of each somewhat vary from those of the other, and probably both from the exact words used. Where then with every effort to be accurate—disagreement—error creeps in—what reliance can be reasonably placed on the half-smothered recollections of days or years, coming through the lips of some uninterested witness, who reports himself as having been at some time past the accidental auditor of certain casual and to him unimportant conversations.

Much depends upon the state of mind of the narrating witness, whether you refer to the time of the supposed conversation, or of the delivery of his testimony. In the case as yet considered, the state of mind was that of indifference. But the witness may have gone, to procure confessions, to garner up what he could, for judicial use. That fact unknown to the party, whose confessions are thus obtained, the information elicited is only on such points and to such extent, as the extrajudicial examiner thinks best adapted to accomplish his sinister purpose. The object in view is not

the whole truth but the reverse ; the object unsuspected by the party-witness, he answers only to the inquiries ; and thus answering, much if not all, which might go to exculpate, is withheld. The witness adverse to the party, he hears with no friendly ear. The explanations and qualifications, if heard, are heard only with inattention, to be forgotten. The questions are one-sided, captious ; one-sided results are sought after ; and the means to obtain them pursued, and the end accomplished.

The extra-judicial confession may be voluntary and intentional, that is, there is the intention that it shall be a confession. If so, if made extra-judicially with the intention to confess, what objection is there to a repetition by the party in open court, subject to judicial interrogation ? If willing to confess extra-judicially, if the supposed extra-judicial confession was in truth as it is reported, the party would be little likely to deny such confession. The judge would certainly rely with more security on the testimony thus heard, than on the reported conversations, related by whomsoever they may be.

So too the casually written documents of the parties in civil or criminal cases may be offered as the confessions of the individuals whose writing they purport to be. The degree of credence, to which they may be entitled, depends on the time, circumstance, and occasion of there being so written. Written for other purposes, they are obviously wrested from their intentional and legitimate use. Were they written for the very purpose of giving an account of the subject-matter of discussion, they would be ordinarily incomplete. The process of interrogation would be required, to develop more fully much that is dark and uncertain. Explanations, additions to, subtractions from, or modifications of, the literal words used, would be required. In the case of the witness testifying under oath, with the intention to relate the whole truth, it rarely happens that the examination in

chief is not essentially modified, restricted or limited, by the subsequent cross-examination. Here there is neither the original nor the cross-examination. When the papers, letters, whatsoever they may be, are written for other purposes, but are subsequently diverted from such original purpose, neither correctness, clearness, nor completeness, can be expected. It is at best mere written hearsay.

Even where intention to narrate every important fact may be supposed to exist, that importance will be relative to the mind of the individual so narrating, and the use which he expects will be made of those facts. His impression of the material or the immaterial may vary from that of another—it may be erroneous. If so, an imperfect development of facts inevitably follows. The importance of a fact is relative to the use to be made of that fact; the use unforeseen, the means of ascertaining such importance are withheld; and the best intentions to relate what would be thus important, would be of no avail.

Extra-judicial testimony reported to the court through the lips of whomsoever it may be, and with accuracy howsoever great, is thus seen to be the mere fragment of testimony, a fragment larger or smaller as it may chance to be, but still a fragment. Received as it is, correction or explanation may be required. The confession may have been made under an error of fact on the part of the individual confessing;<sup>1</sup> there may be misconception, misrecollection, misrelation on the part of the witness. Erroneous from any or all these causes combined, is the party, whose supposed but not real confessions have been heard, to be admitted to correct or explain?

By the rules of the common law, a confession or admission, however erroneously made or incorrectly reported, is

<sup>1</sup> Confessions must be made voluntarily by a competent person, and if made through error, may be revoked before the suit is terminated. *Institutes of Spain*, 328.

irrevocable unalterable, unexplainable. Its supposed original import, as related by the narrating witness, can never be varied or contradicted by the conflicting testimony of the party. True of casual extra-judicial confession at common law, it is not true of advised judicial confession. The accused, who pleads guilty, advised by counsel and cautioned by the court, acts understandingly, with a full knowledge of the consequences of such a plea. Cautious, vigilant that life or character may be protected, blending mercy with vigilance, the judge watches over the rights of the prisoner. The plea of guilty is a deliberate, conscious, advised act. The reported extra-judicial confessions are made to whomsoever may happen to be present, made when there is no one to advise or caution, made unconsciously, not intended to be confessions, erroneous, mistaken, falsely reported, yet they are received. The judicial one-worded confession, the answer of guilty, may be changed for its reverse by permission of the court, the confession the least dangerous because deliberately made by him, may be recalled, the confession the import of which can neither be misunderstood nor misrecalled by the judge, may be revoked. The confessional fragment must remain for ever imperfect.<sup>1</sup> The common law, stern in the barbaric majesty of cumbrous forms and antiquated precedents, hears neither correction, nor receives explanation. The huge car of judicial precedents is driven on, careless of results, crushing all who may be in its path.

All other falsehoods may be detected and refuted. Here

<sup>1</sup> What is said at one time as explanatory of a previous conversation, is not admitted, because, says Mr. Justice Washington, "What a party has said at one time, which makes against him, cannot be explained by declarations made at another time, which possibly were made to get rid of the effect of former declarations." 1 Peters's Circuit Court Rep. 16; 5 Conn. 224. If the admissions first made were erroneous, why should not the party get rid of them? How can that be done but by explanation? Why not permit the jury to determine on the original concession with the explanation?

detection and refutation are denied by the law itself. Excluding all attempts to explain the original or the supposed original tenor of the confession, though the innocent party is unjustly condemned, unless, which is impossible, in every casual conversation with all men, at all times, in every letter or written document which he may chance to write, no matter when, where, or on what occasion, he state every explanatory or exculpatory fact, which may have either a direct or collateral bearing on the subject-matter of his discourse; unless, in fine, gifted with omniscience, he should be able to foresee all possible contingent uses, which in all coming time should be made of his testimony; and thus foreseeing should so adapt it that it shall be clear, complete, and correct, in relation to every possible use thus to be made of it. Thus much he must do, for there is no remark, which may not, as an article of confessional evidence, be used adversely to elucidate directly or indirectly some transaction, in which the party making it may have an interest. The selection of such statements or admissions for use is made by the individual, whose interests they will subserve, and at the risk of the individual confessing or supposed to confess.

In all other instances of hearsay, the primary proof, which by the hypothesis once existed, is unattainable; and for that cause alone, is the secondary, inferior evidence received. Here the presence of the party or the means of enforcing his presence excludes that as the reason of admission. Hearsay, is it the more excusable when it ceases to be necessary? Does it become the best evidence, when a party is the supposed primary, and the worst, when some extraneous individual is the original witness? Hearsay testimony, defective from its recognised deficiencies in the mode of extraction, and in the securities for trustworthiness, is its intrinsic probative force increased by the mere accident of the supposed original percipient witness being a party to the cause? Of the same person, party or not, does

the same reported evidence rise or fall in the judicial scale, as his relation to the cause varies?

The argument is not for the exclusion of confessional testimony (for that evidence would always be proper, were the party a witness), as one mode of ascertaining truth and checking falsehood, but against its admission, if the party be not received. As the law now is, one can only litigate safely with sealed lips. The party nominally excluded but really admitted—excluded for all purposes of explanation, is received when most dangerous to his interest. The judge sees with another's eyes—hears with another's ears. His eyes have become dim, his ears deaf. To meet the witness face to face, he dares not; enough for him is it, to hear somebody who has or who will say he has heard him.

Hearsay, *by the very law of its existence*, is inferior to direct, secondary to primary, original to unoriginal evidence. If the party be excluded by any cause, either of supposed hardship to himself or of danger to the interests of justice, whatever be the reason assigned, it applies with increased force against receiving his confessions. These are the dangers of hearsay superadded to those of the testimony of the party. The exclusion of the party is the exclusion of his confession, or rather would be so were there aught of logical consistency in the law.

But the law, not happening to be logical, if either were to be admitted, selects the testimony most dangerous to the ends of justice. Having selected, the inquiry arises, what, if any, danger would arise, and to whom, from admitting the explanations of the party.

The danger of admission will be one affecting injuriously the great interests of the public, or of the party.

The only fear on the part of the public is, that too much credit will be given to the explanation, and too little to the extra-judicial confession—a danger the very perception of which almost destroys the probability of its occurrence.

But who will thus err? The judge of fact, competent to decide when the testimony is surrounded with so many circumstances prejudicial to truth, when every security recognised by the law as valuable is wanting, is he any the less competent, when those securities are applied by himself, to promote the trustworthiness of the testimony? The Athenians, fearing the effect of beauty on the judicial mind, required that females should be veiled when delivering their testimony. The sight of the party creating mental imbecility—might not the common-law judge, following somewhat the analogous precedent of his Athenian brother, veiling his jury, admit the party?

Were the party received, would not the judge of fact, veiled or not, as should be deemed advisable, be more competent to decide, upon comparing the reported hearsay with the actual answers of the party upon his own interrogatories? The time, the occasion, the manner, the look of the eye, the readiness of response, the motion of the body, the intonations of the voice, are each and all circumstances of such importance, in weighing the credibility of testimony, that without these attendant circumstances, the words may be truly reported and the substance be wanting. Would not the chances of correct decision be more numerous, when the whole evidence should be before the court, than when part only is offered for consideration?

Would the party be injured by being received? The confessions, not made as confessions, diverted from their original purpose, made under an error of fact, erroneously reported, the selection of such as are required for judicial use, made not merely without consultation, but expressly of such as may be adverse to his interests, liberty of explanation is allowed him. Without it error is inevitable. Does he claim the privilege, who is to deny him? Is he satisfied with the language reported—what stronger presumption of its truth? The guilty man attempts to ex-

plain. He dares not, fearing his attempts, undergoing as they must the scrutiny of cross-examination, will develop facts more injurious to his cause than have already appeared. The liberty to explain being allowed—if attempted or not, a new piece of circumstantial evidence of no mean force is obtained. Now, legal silence covers the whole field of confessions, and whether true or false, admitted or contested, they alike receive credence.

The common law, placing great reliance on the truth-compelling power of the religious sanction in other cases, voluntarily abandons it in this. Not merely abandons, but if the original confessions, of which the supposed import is related to the judge, had been obtained under the sanction of an oath,<sup>1</sup> they are for that cause excluded. The sanction, powerful in one case, is it totally powerless in another? Its efficiency, is it varying according to the relation the party sustains to the cause?

Were the testimony of the party delivered judiciously, subject to the process of interrogation with the legal securities of trustworthiness, he would be cautious; if misapprehension existed, it would be corrected. The whole parts in all their bearings and relations would be before the court. Deficiencies would be supplied, doubts removed, explanations rendered. If the admissions or confessions were really as they are related, no reason exists why they should not be made on the stand, with all the securities which so preëminently distinguish testimony thus delivered, from loose and casual remarks, still more loosely reported. If the party state on oath as the narrating witness has already related, his testimony is obtained in the best form; if differently, if the party denies the reported admissions, it is for him to explain in detail the real facts of the case and the

<sup>1</sup> After all, there is no rule on the subject. It is just as it happens,—sometimes received, as in *Rex v. Haworth*, 4 C. & P. 254; sometimes rejected, as in *Rex v. Smith*, 1 Starkie's Rep. 242.

apparent discrepancy between his present and his supposed anterior statements, regarding the same subject matter. If satisfactorily explained, justice ensues, where before it was hopeless ; if unsatisfactorily, then this inability constitutes a circumstance of great importance in arriving at correct decision.

Extra-judicial confessions in the English law, subject to so many infirmative circumstances as they are seen to be, and without the possibility of correction, are yet by the judge considered as sufficient proof upon which, in civil or criminal cases, to base a decision, which may be followed by the severest penalties of the law. The civil law, on the other hand, never grounds a decision on extra-judicial, nor in some instances even on judicial confessions ; a fact which may well deserve the consideration of those interested in jurisprudential investigations.<sup>1</sup>

*Parties to the cause, either plaintiffs or defendants, numerous.*—Here, besides the dangers already considered, new and additional evils arise. The party, whose statements may be offered as evidence, though apparently, may not be really interested ; or, being interested, there may exist an adverse interest of greater magnitude, so, that the apparent loss, which chiefly gives the confidence in the confession, may be overbalanced by a greater gain elsewhere. It may hap-

<sup>1</sup> A confession duly made and satisfactorily proved, is sufficient alone to warrant a conviction without any corroborating evidence *aliunde*. *Wheeling's case*, 1 Leach, 311 ; *Rex v. Eldridge*, Russ. & Ry. 440, 481.

The law of Scotland does not authorize a conviction upon the evidence of an extra-judicial declaration alone, however explicit and however well attested as the free act of the accused, &c. *Glassford on Evidence*, 344, 5.

By the Bavarian law, confession is not sufficient to convict independent of other corroborative proof. 8 For. Quarterly Rev. 299.

The confession of a party, in order to have the effect of full proof, must be free, express, and taken before a judge. Extra-judicial confessions may raise a presumption, but they never constitute full proof. *Vand. Ins. Dutch Law*, 261.

pen in case of numerous contracting parties, that one ignorant of important facts known to the others, or of the real state of the negotiations, may make statements, which, being incorrect, though delivered with the most perfect integrity, may still be as injurious as the most intentional perjury. Those errors, the other parties if received might correct, but excluded, they remain at the mercy of all those, with whom they may happen to be or to have been associated by the plaintiff in his writ. The dangers of receiving this kind of testimony and of excluding those by whom, if erroneous, it might be controlled, increase in proportion to the number of parties and the complexity of the cause.

The common law presents a striking contrast to the rules of equity on this subject. In equity, when the defendant's premeditated answers are given on oath and with the aid and advice of counsel, the answer of one co-defendant is not received against the other, because, "there is no issue between the parties and there has been no opportunity for cross-examination."<sup>1</sup> The confessions of a party are answers, differing only, that they are answers taken in the worst possible shape, and reported to the judge in the most dangerous mode; answers elicited without any security, without any regard or reference had to the rights of the individual answering, or of his associates, without even knowledge on his part that an answer is being obtained, and without the slightest efforts for accuracy, correctness or completeness. The reason good in equity, why permit at common law, when there is no "issue between the parties and no cross-examination," the unguarded, incomplete and casually uttered remarks of one plaintiff or defendant to be used to the prejudice of his associates? Why, in criminal cases, whenever life is at stake, allow a defendant, to be a witness against his associates, without oath or cross-examination,

<sup>1</sup> Gresley's Equity Ev. 24.

and against their consent? Where the party, whose supposed confessions are given, suffers alone, the principle that *consensus tollit errorem*, may, if he mean to confess, be considered as a justification such as it is, of the admission of the testimony. Here, others against their will and without the power of explanation or of cross-examination, may be bound by confessions either false or erroneous in themselves, or falsely and erroneously reported.

*Exceptions.*—The confession is heard—the explanation refused. Heard—but when and under what restrictions and limitations—and, if any, for what cause are they imposed? and how do they comport with the integrity of the general rule on the subject?

“Confessions made under some circumstances are not admissible. When they are *entirely voluntary*, they are to be received; but when they are drawn out by *any*<sup>1</sup> expectation of favor or by menaces they are to be rejected. The reason on which confessions so drawn out are excluded, is *not because of any breach of faith in admitting them, nor because they are extorted* illegally (though there may be cases in which this would exclude them, as when a magistrate puts the accused upon his oath), but the reason is, that in the agitation of mind in which the party is supposed to be, he is liable to be influenced by the hope of advantage or the fear of injury, *to state things which are not true*. In this connexion it may not be improper to state, that this influence, which is to exclude the party’s confession, must be *external* influence and not the mere operations of his own

<sup>1</sup> By Morton J., in *Comm. v. Knapp*, 9 *Pick*, 497. “The slightest influence is sufficient to exclude them.” By Wilde J. In China, the accused is directed to be tortured to extort a confession, if the case appear suspicious. The merit of a voluntary confession seems prodigiously overrated; for any one, who comes to a magistrate and freely confesses a crime before he has been charged with it, is entitled to a free pardon, provided it be a first offence. 16 *Ed. Rev.* 489. How could it be possible to have a confession without influence—the torture or the promise of impunity?

mind. It may be that his own reasonings may induce him to think that he will derive advantage from a confession, and he may be thus led to state things which are *untrue*, but there can be no evidence of that fact."

"A free and voluntary confession is deserving the highest credit, . . . but a confession forced from the mind by the *flattery of hope* or the *torture of fear* comes in so questionable a shape that no credit ought to be given it: therefore it is rejected."<sup>1</sup> Without hope or fear, gain or loss, when was ever a confession obtained. The confession voluntary—it is an act of the will. To confess or to withhold confession? The mind in a state of suspense will, as in every other case, be governed by the balance of opposing motives. The confession without or against motive—without hope or fear—the expectation of gain or loss!—*credat Judæus Appella, non ego*. The common law judge, exceeding, in the prominent characteristics of his nation, the all-credulous Jew—with full faith expects action not according to, but against motive, and is on the alert to prevent evil from the miracles of his own imagining. He takes no thought, lest the descending waters, rushing over the banks, should devastate the surrounding plains. His fears are, that, by some new law of nature, ascending the hills, they should sweep away all the labors of man.

The motive internal, the confession is received, external, rejected. So the motive be not verbally suggested to the mind of the prisoner, no harm will arise. But the hope or fear may exist and not be perceived in its actual workings. It does exist, whenever there is confession. No confession exposing the individual to dishonor or danger was ever made without some adequate inducement, some hope or fear, some gain or loss, some pleasure or pain, which it was anticipated would ensue therefrom; a hope or fear arising

<sup>1</sup> 2 Russell on Crimes, 645.

either from the suggestions of the individual's own mind or from those of another, but equally existing and acting, wherever may have been their origin. Whether this inducement arise *ab extra vel ab intra*, its effect is none the greater or less for that cause. The only difference is in the ease with which its existence can be established. The hope or fear *ab extra*—the individual whose lips uttered the inducement was external to the party confessing, but the mind of the party confessing was responsive to these suggestions, else confession would not have ensued. It arises *ab intra*. The prisoner has arrived, from his own course of reasoning, to the same result, which in the former case was presented to his mind by some one else. Will then his convictions be the less forcible because they are his own and not another's? In each case the motives and their action are identical, the person upon whom they act, and the result the same; yet, evident as all this is, the common law acts upon this ideal distinction between external and internal confessions, excluding the one and receiving the other, as though all were not equally internal, and none the less so, because suggested by some one external to the party confessing. The mind is the seat of action. And all motives then act and are internal, howsoever or by whomsoever presented.

Confessions, obtained "by the flattery of hope or the torture of fear," are excluded, not from any regard to public faith or the illegal mode in which they may be obtained, but solely from a fear lest they may not be true. If not true, the individual confessing guilt is innocent. The danger guarded against is, that of innocence falsely confessing guilt. Guilt without motive,—as probable as gravitation reversed,—voluntarily confessing can only be heard. Innocence, it is feared, against every motive of a self-regarding nature, will confess unreal crimes. Guilt comes in for no favor, for confessions obtained even by fraud or artifice, are

received.<sup>1</sup> It is assumed, to lay the foundation of the rule, that in the majority of cases, or at any rate in so great a proportion of them, that preponderant evil will result from admission rather than rejection, that whenever external inducement is offered, as in the greater proportion of instances, the party to whom it is offered, is innocent, and being innocent, will still, carried away by the inducement offered, confess unreal crimes—the evil for the prevention of which this rule of law is established.

But what is the probability of the occurrence of this evil ? In all cases, where a confession is made upon an intimation that it would be better to confess, the guilt of the individual addressed is implied, on the part of the person offering the inducement. The basis of the suggestion, the hypothesis upon which the advice is predicated, is guilt. No advice is offered, no inducement held forth, to induce innocence to confess unreal crimes. Each party, the individual to whom the inducement is offered, and the individual offering, acts toward the other on the supposition of the existence of guilt. Would then such advice, assuming guilt and advising escape through the means of true confession, induce innocence to jeopardize itself by a false one ? or, if not to jeopardize—to aid itself by a false one ? Is the admission of guilt the natural course by which innocence would seek to escape ? The individual, to whom the inducement is held forth, knows that it is addressed to him as guilty, being innocent, would he be likely for any the slightest inducement, to permit that implication to remain undenied ?

Absurd as such a reason for exclusion is, its absurdity is more fully manifested upon examining some of the instances in which, in pursuance of this exception, confessorial testimony has been excluded.

<sup>1</sup> The court in *Rex v. Danington*, 2 C. & P. 418, received as evidence against the prisoner, a letter purloined by the turnkey.

In *Rex v. Shepherd*,<sup>1</sup> the constable who apprehended the prisoner for larceny, asked him what he had done with the property, and saying: "You had better not add a lie to the crime of theft." A confession thereupon made to the constable was held inadmissible. Why? The advice is to do what? not to lie. Fearing lest the innocent, moved by such strong inducements, should falsely confess, what was said is excluded. To the unlearned in the law, the advice would seem proper; by learned eyes it is looked upon as dangerous in the extreme, ensnaring innocence within the meshes of guilt. Had the advice been to add an additional offence to that committed, would the confession have been received or not? "I should be obliged to you, if you will tell us what you know about it: if you will not, of course we can do nothing."<sup>2</sup> The threat therein contained seems not very apparent; the hopes or fears excited in the mind of the prisoner, imperceptible save to legal vision; whatever of inducement there may be, is not to confess, because if he will not, the prisoner is told, that nothing can be done. Unless he will admit crime, he is distinctly informed he is safe. Would such language induce guilt, certain of impunity if silent, to turn self-accuser? Would it induce innocence doubly safe, safe from its own purity, safe from the admitted want of inculpatory evidence, falsely to acknowledge the commission of crime?

"He only wanted his money, and if the prisoner gave him that, he might go to the devil if he chose,"—thus courteously entreated, the prisoner took 11s. 6d. out of his pocket, saying "it was all he had left of it,"—but the confession was excluded.<sup>3</sup> The intimation here is guilt. There was guilt, else the money could not have been refunded; yet the

<sup>1</sup> 7 C. & P. 579.

<sup>2</sup> *Rex v. Partridge*, 7 C. & P. 557. The confession thereupon made was excluded.

<sup>3</sup> *Rex v. Jones*, R. & R. C. C. 152.

common law adjudges its exclusion. For fear of untrue confessions, true ones are rejected.

“ Give me a glass of gin and I will tell you all about it.”<sup>1</sup> The glass of gin given, the confession is inadmissible. For such motives, the common law assumes, innocence will put on the soiled robes of guilt. Such the inducements which judicial wisdom considers as adequate to produce false confessions. From what source does it draw such conclusions? From the recesses of the human heart?

Such are some few instances taken as mere illustrations of the practical workings of the exception already considered. In each case, was there not guilt? Would not one imagine that the criminal had “ friends at court?” That here, as every where else, over the whole field of judicial legislation, the judge was the sworn accomplice—leagued by the strongest ties to aid—always on the watch, seeking for reasons or the pretence of reasons for the exclusion of what, if admitted, would disserve the guilty. Judge-made law, if *not* made, is *as if* made, by and for him.

But “ the inducement must be of personal nature. It may be supposed that a desire to benefit a child or other near relation, may hold out as strong an inducement to falsify, as when the advantage contemplated is entirely personal.”<sup>2</sup> True it might be so supposed; it would be by any one but a common lawyer. But these judicial weighers

<sup>1</sup> *Rex v. Sexton*, 2 Russ. C. & M. Rep. 645.

“ The prisoner ought *not* to be *dissuaded* from making a perfectly voluntary confession, because that is shutting out one of the sources of justice.” By Gurney, J., in *Rex v. Greene*, 5 C. & P. 312.

“ Now I think as the witness did *not* caution the prisoner *not to confess*, it would be unsafe to receive such confessions.” By Patterson J., in *Rex v. Swalkins*, 4 C. & P. 548.

Such is the advice of the judge, as to the duty of all, and magistrates as well as others, in case of confessions. When thus clearly set forth who could expect error?

<sup>2</sup> By Morton J., in *Comm. v. Knapp*, 9 Pick. 497.

and guagers, knowing of no feeling but that of self, abstracted from all connecting links with the rest of humanity, by their scales give the preponderance to a farthing in money or in gin, when compared with the honor, reputation or even life of a father, brother, or child,—and this estimate they call “the perfection of human reason.”

But the supposed inducements may not have been offered, or notwithstanding they were, the confessions may be true.

The danger feared is of false confessions. The danger evident, so be it; the man of the law should watch. But to what purpose? To ascertain whether in fact the supposed inducements were offered; if offered, whether they were to any, and if to any, to what extent effective; and to see that he be not thereby deceived if they be false. But because improper inducements may be offered, or false confessions made, are all to be excluded? If the confession be true, does any inducement, whatever it may be, destroy its verity? If true, its exclusion is of just so much truth. It would be received, were it not for the supposed sinister action of the motive. Because hope or fear exist, who will say its action is of necessity in that direction? Its sinister action must be assumed, else the reason fails. But whatever the direction of the motive, it may be overbalanced by other motives, acting in an opposing direction; if so, the testimony should be received. What the direction of the motives—what their strength—what the opposing forces in any given case, would seem the proper subjects of inquiry. Such are not the inquiries of the common law judge. He can see but one motive, acting in one uniform direction on all men and at all times. Wherever he sees a motive, which he conceives may act in a sinister direction, he infers that it can act in no other. The many-sidedness of man, the infinite complexity of his internal nature, the innumerable, varying, opposing motives which may operate upon that nature, never occur to a mind which has estab-

lished as an axiom, the universally perjurious power of a farthing, whether in possession, reversion, or remainder.

Whether the confession of guilt be caused by hope or fear, and whether, if so caused, it be true or false, are or rather should be questions of fact,<sup>1</sup> to be determined in the same mode as all other similar questions. The visionary and theoretic judge, ignorant of the parties, and of the motives inducing the attendant circumstances, decides before hearing, that all confessions thus obtained will be false. How can his judgment compare with the practical man, who perceives not merely the insulated fact, but the *circumstantia*—the surrounding and concentering facts. Why not permit the jury to decide on this as on any other evidence, and to determine from the whole submitted, whether the confessions are false or not? Because centuries ago it was judicially foreseen, with more than prophetic vision, that through coming time, confessions extorted by hope or fear, or the slightest inducement of any kind, would be false, and being false, their future exclusion was foreordained.

Notwithstanding the rules of law on the subject, the testimony thus excluded, in some very important respects, is more entitled to confidence than the supposed voluntary but unintentional confession, of the prisoner, which the law considers the "highest evidence," because it is a confession

<sup>1</sup> *State v. Jenkins*, 2 *Tyler's Vt. Rep.* 377. "The confession of a person on trial for a crime, must be submitted to and weighed by a jury; if exhausted by personal suffering, it ought not to weigh in the least,—if *produced by fear or flattery*, the jury must determine whether it is true or not; but if unsupported by corroborating circumstances it cannot operate to convict."

"Indeed I have sometimes *doubted* whether confessions with their *accompanying circumstances*, *ought not always to be received in evidence*; but the law is settled otherwise." By Morton J., in *Comm. v. Knapp*.

The expediency of the law as it is, does not seem to commend itself to the clear head and sound and discriminating mind of Mr. Justice Morton. Indeed, nothing but the inviolability of precedents sustains much of what is laid down as law.

made and returned as such,—and very little likely to be made unless true; while much of what is received is mere casual, thoughtless remark, and entitled to little weight. Confessions, “influenced by the flattery of hope or the torture of fear,” it is seen, have been excluded in criminal cases, because instead of “accelerating and clearing,” they “impede and foul the current of justice.”<sup>1</sup> But the same confessions of the same individual, excluded in a criminal trial,<sup>2</sup> transferred to the civil side for judicial use, are unhesitatingly received. To preserve an apparent self-consistency, the judge has found it necessary to change either his wig or his title, when he reversed the rules of law on the same subject; but in this instance the formality is dispensed with. Excluded in a criminal case, because the confession was caused by hope or fear, and consequently untrue, the same reason should apply with equal cogency in a civil cause, unless it be that truth is less desirable in that class of actions, or that the same statement varies from truth and falsehood, and back, according to the use to which it is appropriated. But it would seem, that with the most utter inconsistency, the same reason, to the same testimony of the same individual, in relation to the same facts, ceases to be applicable, in case the process is changed from the state as plaintiff to that of the individual injured.

Disastrous as is the action of hope or fear on innocence, excluded as are confessions obtained through their action, lest the current of justice should thereby be “impeded and fouled,” it would seem that their sinister effect ceases when applied to guilt. The accomplice, testifying under a hope of pardon, dependent upon his testimony, is received.

<sup>1</sup> 6 Pet. Abr. 83, *Confessions*.

<sup>2</sup> Parol evidence of a confession, made *under a promise of pardon*, is admissible in a civil action: the public officer cannot, by such engagements, affect the rights of individuals. *Patten v. Freeman*, 1 Cox N. J. Rep. 113.

If untrue, the rights of individuals require the exclusion of such testimony.

In his case, the desire of self-preservation may induce falsehood to the injury of innocence. That it should, is as, if not more, probable, than that innocence should attempt escape through the devious path of false confession. If those motives will induce innocence to state untruth, will they not be likely to have more power over guilt? and will not guilt sooner testify falsely to the injury of innocence, than innocence turn its own destroyer?

We have thus analyzed and compared some of the inconsistencies of the law on this subject. Were it more fully examined, those inconsistencies might be still more clearly developed. But the object in view will be fully answered, if the attention of others should be called to the subject.

J. A.

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#### ART. VII.—THEORY OF PROOF IN CRIMINAL PROCEDURE.

*Die Lehrb vom Beweise im deutschen Strafprozesse nach der Fortbildung durch Gerichtsgebrauch und deutsche Gesetzbücher, in Vergleichung mit den Ansichten des englischen und französischen Strafverfahrens, [Theory of Proof in the German Criminal Procedure, &c. in comparison with that of the English and French Systems,] von Dr. C. J. A. MITTERMAIER, Gehemienrathe und Professor in Heidelberg. Darmstadt: 1834.*

[Translated from an article by Mr. Rauter, in the *Revue Etrangère et Françoise*, for January, 1837].

In this new work, the intention of the author, already known as one of the first jurisconsults of his country, has been to present, in a systematic order, the principles and rules, which, in Germany, guide or are intended to guide the criminal judge, in the appreciation of the accusations brought before him. In addition to this end, Mr. Mitter-

maier appears also to have had in view another, which, in its nature, is political rather than juridical, namely, to ascertain how far criminal procedure admits of a legal theory of proof, or, in other words, to what point the criminal judge may be bound by the law to declare himself convinced by such or such a means of proof, independent of his own personal conviction. The slightest investigation of this matter immediately gives rise to the further question, whether the jury is compatible with a legislation concerning proof, which admits absolutely or even only relatively of the system of legal proof? It is also under this last point of view, that the opponents of the introduction of the jury in Germany have regarded this point of legislation, and, knowing the cautious character of their nation, which, in judicial as in other matters, incurs as little risk as possible, they have attacked the jury less in principle, than under the relation of the possibility of making it perform its functions in a manner conformed to justice. The cause of this incapacity, in their opinion, lies particularly in the difficulty or impossibility of establishing rules concerning the proofs, upon which the jury are to found their verdict of guilty. Can this decision be in all points the result of the mere conviction, which the proceedings produce in the mind of the jury? It must be admitted, that, relatively to certain elements of fact in crime, this conviction is absolutely impossible. There are certain elements of crime, which, as the products, if we may so say, of our artificial social state, are themselves artificial, and cannot be established but in an artificial manner. Has a forgery been committed of a commercial instrument? Has the accused committed a theft as a public functionary? Was the second marriage of one charged with bigamy a real marriage? Is one accused of parricide the son of his victim? In all these questions, artificial elements are intermingled, to the establishment of which, the conviction of the jury can do nothing. Thus, those even, who,

in Germany, have been the most in favor of the introduction of the jury, or of its preservation in the Rhine provinces, have been obliged to admit the difficulty ; some have sought to obviate it, whilst others have abandoned the jury, relying for guaranties upon a different organization of the system of legal proof, hitherto in vigor. The latter, desirous at the same time to answer the reproach of impunity and weakness, urged against juries, and to that of absurdity, alleged against the system of legal proof, according to which the judges are bound, even in reference to simple points of fact, to require a particular number of witnesses, or the existence of certain kinds of evidence, and cannot, on pain of nullity, follow their own conviction, when the witnesses and the evidence are opposed to it, have abandoned the jury, and have conferred upon the judges the right of deciding in the same manner as juries, relatively to questions having for their object the natural elements of crime, and, as a preliminary, the question which relates to the morality of the act.

The difficulties, which beset the theory of criminal proof, have induced Mr. Mittermaier to make this theory the subject of a special work, in which he might more thoroughly investigate the principles, which he had already indicated in his course of criminal procedure compared. "I have endeavored," he remarks, "to present the theory of legal proof in its principles, to deduce therefrom all the consequences, to collect at the same time the dispositions of the new German laws, and, in particular, to examine the attempts of combination or conciliation which they have made ; at the same time, I have attempted to develop the differences presented by the English and French procedure."

The work is divided into nine chapters, which treat : 1. Of proof in criminal matters in general, and of its relations with the judgment by judges-jurisconsults, and that by juries ; 2. Of proof by ocular inspection of the judge ; 3. Of

proof by *experts*; 4. Of the confession of the accused; 5. Of proof by witnesses; 6. Of proof by documents; 7. Of proof by the coincidence of accessory circumstances or by marks; 8. Of the mutual support of different means of proof, or of complex proof; and 9. Of incomplete proof.

In the first chapter, the author, after having pointed out the importance of proof in the matter of criminal procedure, gives a historical sketch of the different ways, in which proof has been regarded and legislatively treated among ancient and modern nations, indicating at the same time the predominant spirit of each system, and according to which the proof is intended to lead either to real truth, or only to that which is factitious, that is to say, which is founded upon legal presumptions, to which the judge is obliged to submit himself, and in the presence of which, his most thorough personal conviction is obliged to yield. Thus, he shows that the judgment of God, that is to say, the proof by water or fire used in the middle ages, belonged to the legal or formal rather than to actual proof. Another very interesting remark is, that the inquisitorial procedure, or that which is commenced officially by the judge, favors the tendency towards material proof, in this, that the judge, being obliged in the first place to investigate the body of the crime and the proofs, without necessarily having in view a particular person as the offender, is led naturally to actual proof; the ordinary procedure, among the German nations, as among the Romans, being accusatorial, that is to say, which originates in the accusation brought before the judge by the party injured, the proof was originally rather of the formal kind. The ecclesiastical procedure, which was naturally inquisitorial, had an opposite tendency; but as it threatened to become merely arbitrary, the popes soon gave the inquisitors instructions, in which were contained the elements of legal proof. From these instructions and from the ecclesiastical proof thereby regulated, the secular criminal procedure

soon borrowed its rules ; as would naturally be the case, when the extension given to the investigation of the crime of heresy was continually drawing a great number of the people before the tribunals of the church. According to another tendency of the age, that of applying the Roman law to the exigencies of society, certain Roman laws, which would admit of an interpretation favorable to the formal proof, were invoked for its support. In this manner, that theory of legal proof was formed, in the fourteenth century, which prevailed also in France until the epoch of the constituent assembly. The emperor Joseph the second, and the grand duke Leopold of Tuscany, first undertook the reform of this state of things, to which their attention had been called by the writings of Beccaria and Filangieri. Mr. Mittermaier gives a view of the opinions advanced in the nineteenth century by the German publicists, and the changes introduced into the German common law, by the various codes published in divers German states during the same period.

The author treats afterwards of proof in general ; and, speaking of the different attempts made to establish a system of legal proof, he reviews the English law, the French law, and the different new laws of Germany ; he finds on summing them up, that they may all be reduced either to providing, that certain means of proof (such as the testimony of children) shall not be admitted ; or to giving complete instructions concerning the appreciation of proofs by the judge, to which the latter is not absolutely bound, it is true, but which are given to him as the rule of his official conduct ; (the author says that the English common law and Mr. Livingston's code of evidence contain instructions of this kind) ; or the law also gives the judge instructions, which are obligatory ~~on~~ pain of nullity of the judgment ; (this is the case in the new codes of Bavaria, Prussia and Austria, and in those of a majority of the other German

states);—or, finally, the law gives certain rules in relation to the proof, which it requires the judge to observe, but proclaiming at the same time, that it does not bind him to declare the existence of guilt, merely because the intention of these rules is complied with, and requiring that he should also have a moral conviction of the crime of the accused. The latter, according to the author, is the system of the new Dutch criminal procedure.

In the following paragraph, the author undertakes to justify the system of legal proof in Germany from the reproach of absurdity, by showing, on the one hand, that the jurisprudence does not at all admit that the judge is bound, under pain of nullity, to declare himself convinced merely because two unexceptionable witnesses have uniformly deposed to the fact of guilt, and, on the other hand, that there is nothing unwise in limiting the official discretion of judges, under a judiciary organization, which does not and cannot admit of the numerous peremptory challenges which may be made against juries. He adds, that the rules established by the law in the matter of legal proof are not the results of legislative caprice, but that they are the sum of a long experience, which legislation has sanctioned in behalf of the defence rather than of the prosecution; that if the law should abandon the fate of the accusation to the moral conviction alone of the judges, there would be danger that the different proofs adduced might produce a different effect upon the judges taken individually, since the impressions of the mind vary according to the individuals; that if it cannot be denied, that the faculty of discerning truth is susceptible of being improved, like all the other faculties, it must also be admitted, that the knowledge of what has been discovered and practised in this matter by the most cultivated understandings, may advance the improvement of this faculty in the judge, and even enable him to discover the truth more readily in a given case; that in the system of

proof by individual conviction, there is a probability of the occurrence of decisions which are contradictory in point of principle, according to the character of the judge who may be called to the decision of analogous criminal affairs, but which there is no fear of on the part of judges who decide according to the positive law; and this is an important circumstance, if we reflect that the confidence which the tribunals ought to enjoy depends in a great degree upon it; and, finally, that it is not for the legislator who establishes rules concerning proof, to create or sanction private rights properly so called, but only to deduce from the eternal laws of truth, rules proper for its discovery in each particular case.

The author also examines in a separate section, in what relation this system of legal proof stands with the institution of the jury. This part of his work is the more interesting, from the fact, that he had already more than once pronounced an opinion against this institution. At the present time, he views it more favorably, and, after having examined with great sagacity, the political reasons for and against the jury, he finishes by concluding, that, among a people who have attained to a certain degree of civil and political development, and among whom civic courage is predominant, the institution of the jury is preferable to that of arbitrary judges of power. Returning again to what more especially constitutes the subject of his work, he undertakes to show, that this institution is not opposed to the establishment by law of instructions relative to the proof, less as a rule to be observed on pain of nullity, than as a guide which the juries should be invited by the legislator to follow with firmness and good faith. In support of his opinion, he observes that the French code itself, whilst it prescribes to juries not to make up their verdict but according to their *own conviction*, nevertheless speaks at the same time (art. 342) of the impression which the *proofs* brought

against the accused and the means of his defence have made upon the reason of the jury, and indicates this impression as the foundation of their conviction, and that besides this it establishes positively, as to the means of proof, certain limits which the jury is not at liberty to disregard on pain of nullity; (such is the prohibition to receive the depositions of the father and mother or of the children of the accused). He adds, that, among the English, the intention formed by the law is realized, since their common law contains a popular instruction in regard to proof, the rules of which, in his opinion, are analogous to those established by the German legislation.

The limits of this journal prevent us from following the author in the further development of his subject; what we have already said will suffice, we hope, to call the attention of jurisconsults and statesmen to his work.

L. S. C.

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ART. VIII.—THE CUSTOMS OF THE GERMANS AS DESCRIBED  
BY TACITUS—A SOURCE OF THE COMMON LAW.

THE English law, like the English language, is mixed and compounded of many elements. To understand it in a thorough and scholar-like manner, we must trace the sources from which it springs. These sources are many, and drawn too from a sufficient distance. Although we are indebted to the civil law for many principles of our own, (especially in equity and commercial jurisprudence), yet it is from our sturdy and roving ancestors of the north, that we have derived the broad and bold outlines of that happy system under which we live, and whose very aim and end is liberty. Strange as it may seem, it is nevertheless true, that those hordes of Goths and Vandals that swarmed from the northern hive, and whose name has become a re-

proach and a by-word for all that is barbarous, are the very people that spread law, language and liberty over our western world. If, therefore, it is to be regretted that they overturned an empire which would soon have fallen of itself, and destroyed monuments of art which time in its course must necessarily have swept away, is it not to be rejoiced, that they brought with them customs as free as they themselves were wild, and planted institutions which have grown in wisdom, as they have ripened with time?

Fortunate, indeed, is it for the lawyer no less than the scholar, for the patriot no less than the antiquary, that those customs (the very fountain of liberty) have been sketched by the graceful pen of Cæsar, and painted by the masterly hand of Tacitus. Cæsar, indeed, fought and traveled through Gaul and Britain, and therefore records what he has himself either seen or heard among the natives. But Tacitus wrote at home. The precision and accuracy, with which he has penciled the manners of the Germans, may well excite wonder, for Germany was at that time a distant, unknown, and barbarous province, and he himself had never wandered among its wild forests and still wilder warriors. His little treatise, as indeed every thing he wrote, is terse in style, graphic in description, and masterly in all its parts. It is equally curious and useful; curious as the account of a people almost in a state of nature, and useful for the noonday-light which it sheds upon the early antiquities of the law.

Of all the features of the common law, the boldest and broadest are its love of liberty, its devotion to good morals, and its abhorrence of fraud. We do not mean to say that these grand and holy principles have not entered in a greater or less degree into other systems of jurisprudence, both ancient and modern, but that they belong in a peculiar and eminent manner to our own. In this system, fraud vitiates every thing which it touches, and no obligation is enforced which

is founded on a breach of sound public morals. It declares that the consent of the governed is the only true source of all law. It proclaims liberty, rightly understood, to all that come within its pale, and brooks not the doctrine, that the pleasure of the prince is any rule of conduct to the subject. Here it stands in bright contrast with the law of imperial Rome, and clearly shows its origin and descent. Of all the uncivilised nations of whom we have any record, the Germans were the freest, most moral, and most trustworthy. For upwards of two hundred years, they struggled for their country and their rights, and kept the Romans at bay. Their wars ended oftener in victory than defeat. The resistance of Spain, of Gaul, or of Parthia, was not half so stout nor their conquest half so bloody as that of German liberty. In their forests and fastnesses, they routed or took captive five consular armies, and the defeat of Varus and his three legions, no reader of Tacitus can ever forget. No Roman general from Julius Caesar to Germanicus ever attacked them with impunity. The threats and pompous preparations of Caligula were as harmless as they were empty. And after being attacked in their own provinces by a people whom they set out to subdue, the Romans found in their victory over the Germans and over German liberty, the show of a triumph, rather than the solid gain of a conquest.

While the Germans equaled other uncivilised nations in valor and liberty, they excelled them all in purity of morals and inviolate preservation of faith. In such sacred regard did they hold their word, that after they had lost their property at play, they would wager their persons and their liberty. If the die was cast against them, they suffered themselves to be bound, bought and sold as slaves, and what to others would seem obstinacy, they dignified with the name of faith. Nothing could surpass the refined and elegant esteem in which they held the fairer sex. They

saw in woman something divine and prophetic. They always hearkened to her counsels, and sometimes worshiped her as a deity. None but noblemen had more than a single wife. Adultery was rare and punished in the severest and most public manner. In some cantons none but virgins could marry, and as a second wedlock was forbidden, the wife looked upon her husband as upon herself, without the desire, certainly without the expectation, of another marriage. And thus by good morals were sown the seeds of good laws.

From this institution of marriage among the Germans, so pure and excellent for a barbarous people, is plainly derived that union of husband and wife at the common law, upon which depend almost all the legal rights, duties and disabilities, which either of them acquire by marriage. In the civil law, husband and wife were separate persons; at the common law, they are one and the same. The difficulty of procuring a divorce, the tenderness of the parental power, the severe punishment of adultery and other crimes against the married state (in which points the English law differs from the Roman), may readily be traced to the same source. Again, different as these two systems are in their regulations relating to landed property, in none are they more so than in those relating to dower. In the civil law, dower signified the marriage portion which the wife brought the husband; in the common law, the estate to which the wife is entitled on the death of the husband, out of such lands and tenements as he was seised of at any time during the coverture, and of which any of her children might by possibility have been heirs. Some have ascribed the introduction of dower as it stands with us to the Normans, as a branch of their local tenures, although no feudal reason can be given for it. And Blackstone thinks that it is a Danish custom, being introduced into Denmark by Swein, the father of Canute the great, out of gratitude to the Danish ladies,

who ransomed him with their jewels when taken prisoner by the Vandals. We think, however, that its source can be traced still higher up in point of time. For with the Germans, the husband brought dower to the wife, not the wife to the husband. At first it consisted of oxen, horses, helmets and other articles of personal property, in chief esteem and use among them. The manner of endowing was very similar to those two species still known in the English law, *ad ostium ecclesiae* and *ex assensu patris*. Among wild and roving tribes, personal property is always the subject of ownership before real, but as the country peoples, the lands are parceled out and occupied, and thus very naturally dower, which at first was confined to the one, was afterwards extended to the other.

No point in the antiquities of the law has been so learnedly searched or warmly disputed, as the original constitution of parliament. As usual, parties have arrayed themselves against each other on the subject, and each man inclines to this side or that, just as he happens to be a whig or a tory. It is, however, sufficiently agreed on all hands, that the English parliament sprung from the Saxon *wittenagemote*. But whence was the *wittenagemote* itself derived ? Evidently from the German assemblies. The English parliament consists of king, lords spiritual and temporal, and commons. The German assembly is made up of prince, priests, leaders, and people. The one is convened at appointed times; the other always meets at the full of the moon. In both, a speech is first made by the king, and in neither does he command obedience, but rather solicits concurrence. In the one resides the power of accusing and condemning ; in the other is lodged that of impeachment and trial for high treason and other crimes. To both the members go armed ; to the one with weapons, and to the other with privileges. Neither the English noble nor the German peasant thinks it consistent with his dignity or freedom, to meet

at the precise day, and, to carry the parallel even into trifles, in the night and not the day, are held the sessions both of the English parliament and the German assembly.

It is well known that king Alfred, when he revised and remodeled the Saxon laws, divided England into counties, hundreds and tithings. Each hundred was entitled to a court and was responsible for all felonies committed within its limits. Whenever a robbery or a murder was committed, each hundredor raised the hue and cry by horn and by voice, and thus the felon being pursued from vill to vill was soon overtaken. The division into tithings, Alfred may be said to have invented, but that into hundreds, and which naturally suggested the other, he doubtless borrowed from Germany. The German states were divided into cantons and hundreds, and the only difference between the German and the English hundred is, that the one was a military and the other a civil establishment. The German infantry was mixed with the cavalry, and being composed of chosen bands of youth, was always placed before the rest of the army in battle. Its number was always limited—one hundred being sent from each district; and being called hundredors on that account, were held in the highest honor and esteem. Thus this institution, similar in its nature but different in its objects, was eminently useful to both countries, protecting the one from crimes and offences, and the other from violence and foreign attack.

Anciently and even until after the time of Blackstone, wager of battle was a species of trial at the common law. In this trial, the defendant might choose his champion, and test the justice of his cause by an appeal to arms before the ermined judges and learned sergeants. The champions met at sunrise, dressed and armed with a baton and a leathern target, and victory followed if either party was killed or proved recreant, or if the champion of the defendant could maintain his ground until the stars rose. The

Mirror deduces this mode of trial from the combat between David and Goliath. But we think we need not go so far; for it is plainly derived from a custom, which prevailed among the Germans and other northern nations, and which sprang from their military spirit and ambitious turn of mind. The Germans were particular in their observance of auspices and lots, the flight of birds and the neighing of horses. When they were at war with any people, they seized the first captive they could, and compelled him to fight in single combat with one of their own champions. Each was armed with the weapons of his own country, and the victory of either was looked upon as prophetic of the event of the war.

Before the Norman conquest and for a long time after, the law of England was noted for the fewness, as it now is for the number, of crimes which are punished with death. Whenever an enormous offence was committed, a fine called *weregild* was paid by the malefactor to the friends and relatives of the person injured or killed. This pecuniary satisfaction owes its original to the Germans, among whom homicide itself was expiated by the gift of a certain number of herds and flocks, and with this gift the whole family must be satisfied, in order to stifle their animosity and thirst for revenge. A fine was always paid by offenders to the state, and to the person injured or his relatives. These customs are the original of the law of appeal, which is an accusation by one subject against another for some heinous crime, demanding satisfaction for the particular injury suffered, rather than for the offence to the public; and of the law of forfeiture, whereby a man loses his lands and they go as a recompence for the wrong which he has done to an individual or the public. The essence or principle, both of the German custom and the English law, is precisely the same; to punish the party who commits the offence and compensate that which is injured, and thus at the same time to suppress both crime and a desire to revenge it in individuals.

It is undoubtedly true, that a vast portion of the law, and especially of real property, hangs upon the feudal system; it is equally true, that this system itself, although finally and firmly planted in England by William the Norman, and his mail-covered barons, was not unknown to the Saxons, and was brought over by them from Germany. Its polity and principles are so strange and singular, that neither in its bud nor its bloom can it easily be confounded with any other. Wherever it has taken root, or by whomsoever introduced, it has always sprung from the same circumstances, subserved the same purposes, and accomplished the same ends. Among the Germans, each leader was surrounded in peace, and attended in war, by a crowd of companions or knights. Among these companions, there were several grades, and as the ambition of the leader was to accompany his king with the largest train of followers, so that of the knight was to stand highest in the eye of his lord. In battle it was base for the leader to be conquered, and still baser for the follower not to equal him in daring deeds; but to leave him on the field of battle, was a mark of infamy and disgrace which lasted for life, and which death itself could scarcely wipe away. The chief fought for glory; the follower fought for the chief. When they had no wars of their own, they roamed into other lands and fleshed their maiden swords, wherever there was a field for chivalry or for arms. The unbounded liberality of the prince was supported only by the plunder of his bands, and thus the feeling of generosity in the one, and thirst for rapine and robbery in the other, knitted them together in bonds which nothing could sunder. They preferred to attack the enemy, and challenge honorable wounds, than to plough the ground or wait with boorish patience the golden return of harvest. Nor, to quote the words of the historian, could you easily persuade them to gain by the sweat of their brow, what they were able to snatch at the price of their blood. Although it is beyond

dispute, that wills are as old, nay older in England, than the Norman invasion, yet it is agreed on all hands, that no man before that event, had the absolute disposition of his property by testament. It is probable that the Anglo-Saxons, like their German ancestors, at first allowed neither wills nor disinherison, until in the course of time and increase of trade, this restraint was removed. It may safely therefore be asserted, that in England, the absolute disposition of property, by last will and testament, never belonged to the subject, until it was bestowed upon him by the statute of Henry the Eighth. To the German law of descent, may also be traced gavelkind, borough-english and many other customs (the remnants of Saxon liberty) for which the Kentish men, we are told, have fought with such desperate valor, and by which they proudly prove themselves to have been exempted from the vassal bondage of the Norman conquest. Nor must we forget the trial by jury, that boast of the English law and bulwark of English liberty. We will not stop to pronounce any eulogium upon its excellence, for the eloquence of ages has been exhausted in its praise. It is our purpose only to say, that we are indebted for its introduction, neither to classic Greece nor imperial Rome, but to a people, who, equaling either in chivalry and in arms, surpassed them both in the unfettered freedom of their lot.

These are a few of the leading and living principles of the English law, which may clearly be traced to the forests and marshes of Germany. They are simple and were naturally brought into life by the wants of a wandering and uncivilized people. We know that the idea of deriving from such a source, the vast and intricate machinery of the English government, is treated by many writers of learning and fame, as fond and fanciful. We know that the sketch of Tacitus, has often been looked upon rather as a lively portrait of the manners of a free and generous people, drawn

in a great degree from his own imagination, and intended to rebuke and reform the morals of Rome, rather than to describe those which really prevailed in Germany. Upon what grounds this opinion is based, we are at a loss to know, unless it be in the vanity of those who advance it. Many men there are, who delight to display their ingenuity in probing motives which never existed, and unfolding designs which were never dreamt of, by those at whose door they are so kindly and bountifully laid. Nor is the number less of those, whose minds deal so largely in philosophy and abstraction, that they perceive in the laws and manners of every people, ancient or modern, barbarous or civilized, the same elements and original principles, and recognise in none any peculiar or distinguishing features. Suffice it to say, that Tacitus was a historian, and not a novelist, that his treatise on Germany is no more a piece of fancy, than his Annals, his History, his Life of Agricola, his Dialogue on Oratory, and that it is confirmed in all its leading points by Julius Cæsar, and every writer of antiquity that speaks upon the subject.

It is undoubtedly difficult to say, that this custom was derived from the Germans, and that from the Britons; that one law was introduced from Rome, and another from Germany. But can it be denied that the Saxons brought their laws, as well as their language into Britain, when they subdued it? Is it likely they would have left behind the customs in which they were bred, and tamely yielded, or slavishly adopted those of the country which they had so lately conquered? Is it not more likely that they would have blended their usages together, and thus made a system more perfect than either? The customs of the Germans are plainly one of the streams, which, uniting their waters, form the broad and deep and clear river of the law. That law has been enlarged and improved, and worked upon by the wisdom of a thousand years. The wisest heads have been

content to search, the ablest pens have been glad to teach, and the profoundest sages have been proud to unfold, its free and manly principles. The forum, the field and the scaffold have equally been the theatre of its triumph and defence. The tongue of the orator has waxed warmer, and the pulse of the peasant beat faster in its cause. Its servants have ever been the champions of liberty, and the friends of the people. Its history teems with magna chartas and bills of right. Every age has found a Mansfield and an Erskine; every tyrant a Hampden and a Sydney. In times long before the memory of man, its chosen temple, Westminster hall, was lighted by the learning of the English judge and fired by the impassioned eloquence of the English advocate. Venerable for its age, lovely for its beauty, admirable for its orderly simplicity, and above all adorable for its freedom, it has ever been the worshiped mistress of the noblest minds, and the guardian angel of the dearest rights. Philosophy and genius have in turns been priests at its altar, and the vestal flame of liberty has never ceased to burn and blaze on its hearth.

R. W. Jr.  
Lexington, Ky.

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#### ART. IX.—ON THE LEADING ARGUMENTS URGED IN ENGLAND FOR A CONTINUATION OF THE SEPARATION OF THE LAW AND EQUITY JURISDICTIONS.

[By Arthur James Johnes, Esq. of Lincoln's Inn, author of "*Suggestions for a Reform of the Court of Chancery, by a Union of the Jurisdictions of Equity and Law*," reviewed in the *American Jurist*, vol. xiii. p. 459.]

1. THE separation of jurisdictions is equivalent to a division of labor in ordinary trades and professions, and thereby secures greater skill and knowledge in each individual department. The knowledge of a chancery barrister, for example, is

more profound as respects the law and practice of his peculiar court, than it could be were it incumbent on him to acquire similar experience in the common law courts, in the ecclesiastical tribunals, &c.

On a close examination of the facts, the fallacy of this argument will be strikingly conspicuous. The advantage of a division of labor in common trades and in some professions results from the fact, that the difficulties to be surmounted in acquiring the requisite knowledge, are for the most part the result of the variety which exists in the *laws of nature*. The members of the medical profession, for example, who turn their attention exclusively to the structure and functions of the eye, possess more skill in the treatment of that delicate organ, than the general practitioner can ever hope to acquire. The reason is obvious; the instruments of human vision, though influenced more or less by the state of the constitution, are dependent, nevertheless, on a set of laws distinctively their own. There are laws of nature, which it is not in the power of man to remodel, and to which he must conform in the distribution of the efforts of his head and his hand. But a totally different question arises, where the rules which are made the ground of a new division of labor, are not the creation of nature, but of man himself, and are susceptible of change by his fiat and control.

A careful analysis of the principles of our equity jurisdiction leads strongly to the conclusion, that the division of jurisdictions, so far from simplifying our laws, is actually the direct cause of their most obscure and perplexing anomalies. Take, for example, Mr. Fearne's work on Contingent Remainders, the most difficult book that the law student is doomed to master. What is the distinction between legal limitations and executory trusts, which occupies so many of his pages? A legal use is an estate within the jurisdiction of the common law; an executory trust is a creature of

equity. These obscure phantoms of Anglo-Norman jurisprudence have, no doubt, various other features of distinction, besides those arising from the different tribunals, whose authority they recognise. But still I feel satisfied that an attentive student of this branch of the law will, on reflection, arrive at the conviction, that the singular and grotesque subtleties by which it is deformed would probably never have arisen, had the whole subject been under the control of one set of judges, who could have rendered it harmonious and consistent.

Another striking example of the direct tendency of a separation of jurisdictions, to render legal rules conflicting and intricate, is the inconsistent course pursued with respect to the line of separation between the courts of law and equity, by two great common-law judges, lord Mansfield and lord Kenyon. In this instance, the division of jurisdictions was the sole source and subject of the conflicting opinions of these eminent judges. With regard to the general merits of the questions, which came before those learned personages, no difference of opinion can exist; under a united jurisdiction, they would have been decided without difficulty; but the most acute and sagacious minds may go astray, when they are called upon to adhere to a boundary, too vague and shadowy for the eye of common sense.

2. The proposed union of jurisdictions would be a violent innovation on the present laws. This is obviously a fallacious inference. A change in the arrangement of tribunals does not imply any change in the laws themselves, any more than the substitution of one judge for another, or a change in the locality of the courts, &c. &c.

3. The present tribunals have worked well in practice, and have been found to harmonise with the peculiar laws of England. It admits, I conceive, of very distinct evidence, that the effect of the division of jurisdictions has been to introduce discrepancies and fluctuations in the whole tenor

of our laws, which would not otherwise have existed. But even granting that our courts and our legal rules have been in unison in passed ages, it is a totally unsupported assumption, that they will for that reason work harmoniously in future times. Our laws are no longer the same; the labors of the real property commissioners, based on the theoretical principles of Bentham, Humphreys, and other writers, have already produced a complete revolution in that branch of our laws, in which the conflicts between the equity and common law jurisdictions have been ever most conspicuous. Is it to be supposed, that organic changes in the laws themselves will not render equally imperative a corresponding change in the jurisdictions, which are their organs? Unless these two reforms go hand in hand together, it is obvious, that the attempt to "put new wine into old bottles," to accommodate rules founded on modern civilization, to the barbarous jurisdictions of the middle ages, will be attended with the most pernicious effects, with a multitude of jarring interpretations, which will form the germ of extensive litigation.

4. The authority of the most illustrious ornaments of the law is unfavorable to a union of the two jurisdictions. But little importance, I conceive, ought to be attached to the expressed opinion of the early authorities of our law, on such a subject as that under discussion. Not that I am disposed to depreciate the profound wisdom of many, and the noble spirit of liberty which animated not a few, of the fathers of the English law. But it would be an injustice to them and to ourselves, to try their views by the standard of an age, totally different in all its features, from the primitive times in which they lived. The science of forensic legislation, indeed, may be said to be entirely the growth of the present period, and it does not appear more reasonable, to quote the names of Coke<sup>1</sup> and Bacon against Bentham

<sup>1</sup> I think there is very ample ground for believing, that even these venerable authorities were impressed (however vaguely) with a sense of the evils of separate jurisdictions.

and his disciples, on questions of legal reform, than it would be to oppose the astrology of lord Bacon to the discoveries of Herschel. With these impressions, I shall refer only to those lawyers who have lived in or near our own times.

1. There can be no question that Bentham, the most profound and original of law reformers, was opposed *in toto* to the present system of English jurisdictions. The names of Humphreys and Austen may also, I think, be quoted on the same side.

2. Amongst the most eminent practical writers, and the most distinguished judges, authorities are to be found against every branch of the equity jurisdiction. The very individuals (many of them highly eminent for their professional rank and experience), who uphold the system of equity, as a whole, expressly object to individual branches of the jurisdiction.<sup>1</sup> For example: the illustrious chancellor Kent, though a decided and formidable advocate for separate law and equity tribunals, evidently approves in his commentaries of the extension of the powers of the common law courts, to several cases of mortgage and trust, a change effected by the revised statutes of New York. Again: in England, the relief, formerly given only by a bill of interpleader, has recently been placed to a considerable extent, in the power of our common law courts; many questions affecting mortgaged estates, which were originally confined within the peculiar province of equity, have likewise been committed to the hands of the common law judges; and various other instances of the same kind may be mentioned.

Such changes as these, it will be said, are mere innovations in detail. But details are the basis of the equity jurisdiction. It is not founded on the grand principles of nature or of reason, but consists of scattered doctrines ap-

<sup>1</sup> Mr. S. C. Cooper, an advocate for the separate jurisdiction, recommends the transfer of a portion of the powers of equity to the common law courts.

plied to the most diversified and unconnected subjects. Trusts, mortgages, fraud, partnership, account, &c.—such topics as these are the very elements of the authority of the court of chancery. The consequences, to which innovation in other branches of the law will give rise, are direct and obvious; those subtle distinctions between the two jurisdictions which have perplexed our ablest lawyers, even during periods of repose, will be utterly unavailing during a state of transition like the present. Every change in the law of real property, or in the rules affecting commercial transactions, will inevitably give rise to the most intricate questions, as to the tribunal by which the new law is to be enforced. The time is undoubtedly arrived, when, for the sake of securing a prompt and impartial administration of justice, our whole forensic system must be revised. As regards the equity jurisdiction, the only question is, shall it be left to be annihilated by the indirect influence of innovations in other branches of the law, or shall it be remodeled by wisdom, and reformed upon principle? To uphold the system itself, is manifestly impossible. Even the warmest advocates of the equity jurisdiction object to the individual branches; they choose, it is true, different points of attack, but like the wives of the unfortunate man in the fable, some rend away the black locks, while others root out the white ones, until nothing but a bare scalp remains at last.

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#### ART. X.—MORAL INSANITY.

*Fifth Report of the Superintendent of the State Lunatic Hospital, Worcester, Mass., from December 1st 1836, to November 30th, 1837.*

This document must be interesting to all who have at heart the welfare of our species, but there are some things in it,

that render it peculiarly so to the legal profession. Its highly respectable author has here recognised that form of mental disease, called moral insanity, (or that which is confined to the moral or affective powers, the intellectual not being perceptibly affected), and furnished several striking cases in illustration of his views. Our readers may be aware, that it was not till within a few years, that moral insanity, existing independent of intellectual, began to find a place in medical treatises on insanity, and that it has not yet been admitted in courts of justice. Considering the magnitude of its legal consequences, the question whether it has a real existence in nature, or is merely a speculation of medical theorists, is one of vital importance to the legislator and jurist. Every contribution to our knowledge of the subject should be gratefully received, and especially such as come like the present, from plain, strong-minded men, who offer us only the results of their own observations. The idea of moral insanity, as described by many distinguished men in other countries, who have obtained their results in the proper method and spirit of scientific inquiry, has in some instances been scouted from the courts, as a presumptuous and dangerous speculation. Will they receive with any more respect the statement of Dr. Woodward—one whom they know and whose statements they may verify for themselves, if they please, that having examined the records of the hospital under his charge, "he is satisfied, that at least one fourth of the cases of mania committed by the courts [because their being at large is deemed dangerous to the community] belong strictly to the class of moral insanity." Not that courts recognise the existence of this disease in theory, but having only to consider the conduct of the patient, they do not extend their investigation to the exact form and extent of his disease.

Two cases are related at considerable length, of a form

of moral insanity, denominated by Dr. Woodward insane impulse, which present a remarkably faithful picture of the workings of the mind in this condition, and are calculated to convey a more exact idea of the disease, than any merely general description. Besides these two, there have been nine other cases of homicidal insanity in the hospital. In three of them, there was delusion which had a direct agency in producing the homicide.<sup>1</sup> In another there was delusion, but it is not known whether it had any influence on the conduct. In three others, "there seemed to be no premeditation of the act at all, no malice existing, and no collision of any sort; a momentary impulse of passion, or a propensity to destroy, hurried the unfortunate individual to the desperate act, and regret, anguish, and deep sorrow followed almost immediately the perpetration of the deed." In the two remaining cases, the state of mind was doubtful.

The following remarks of Dr. Woodward, the correctness of which will, no doubt, be readily acknowledged by the medical profession generally, ought to convince the most skeptical, that the admission of the doctrine of moral mania will not utterly subvert every idea of legal responsibility.

"While, on the one hand, the definition of insanity should not be so circumscribed as to release from confinement half the inmates of our hospitals; it should not, on the other hand, be so extended, as to embrace every eccentricity of character, every unaccountable ebullition of passion, or estrangement of feeling. There is a middle ground that is right; there is a point where responsibility ends, and irresponsibility begins, and every fact that has a relation to this question, is important and valuable. With the obscurity and doubt which hang over this subject, no one ought to presume to decide with great confidence where responsibility ends."

<sup>1</sup> These are not properly cases of homicidal insanity, which is a species of moral mania in which the intellectual faculties are supposed to be sound.

Dr. Woodward describes a condition of mind, which he denominates moral idiocy, "or such an imbecile state of the moral faculties, from birth, as to make the individual irresponsible for his moral conduct." Its subjects, he says, "have rarely much vigor of mind, although they are by no means idiots in understanding. Of the idiots that have come under my care, there have been some, whose minds are very imbecile, who seem to have considerably correct views of moral obligation, and whose moral powers are susceptible of culture. There are others, who, having much better powers of understanding, are capable of learning to read, and of understanding what they read, yet seem to have little or no moral sense."<sup>1</sup>

We regret that Dr. Woodward's language is not always so precise and well-chosen, as it should be, in discussing such subjects as this. In the following passage, at the top of the 69th page, he has uttered a sentiment which we cannot think he fully believes without some essential qualification, which, in the hurry of preparing the report for the press, has, perhaps, been accidentally omitted. "In my view, the question [whether the accused is insane or not] should arise in every case of criminal prosecution, and should be satisfactorily settled before the jury render a verdict." Looking at the passages immediately preceding, we are inclined to believe that he meant to say, that the question should arise in every case of criminal prosecution, *where there is good ground for suspecting the existence of insanity*; and, at all events, the author can hardly be supposed to intend to assert, that the sanity of the accused should be made a preliminary question, in every trifling case of assault or petty theft.

I. R.

<sup>1</sup> This condition of mind is described by Dr. Ray in his treatise on the Medical Jurisprudence of Insanity, under the title of moral imbecility. Ed.

**ART. XI.—SKETCH OF THE LIFE AND CHARACTER OF WILLIAM M. RICHARDSON, LATE CHIEF JUSTICE OF THE SUPERIOR COURT OF NEW HAMPSHIRE.**

[Extracted from a charge delivered to the grand jury of Cheshire county, (N. H.), at the last April term of the superior court, by Mr. Justice (now Chief Justice) Parker.]

THE subject of this notice was born at Pelham, in this state, January 4, 1774, and labored upon his father's farm until he was about fifteen years of age, when an injury to his hand for a time incapacitated him for active exertions. During the period of leisure thus forced upon him, he indulged a taste for study, and determined to procure for himself a collegiate education. This he accomplished, and graduated at Cambridge university in 1797.

Immediately after this he engaged as an assistant instructor in an academy at Lancaster, Massachusetts; after which he took charge of Groton academy, and continued there as principal, until his admission as a member of the bar.

In the course of his collegiate studies, and during the time he officiated as an instructor, he became thoroughly imbued with a taste for poetry, and classical and general literature, as is in some degree indicated by his appointment to deliver a poem upon the occasion of his graduation; and his love for such studies and pursuits continued unabated to the close of his life.

The law is generally accounted a stern mistress, requiring of her followers an untiring devotion at her shrine, and it is rare that her servants find leisure for eminence in any other pursuit; but with him literary acquisition was pastime—was recreation—and long after he had taken his seat upon the bench, he studied the French, Italian and Spanish languages without assistance, and could read the two former with considerable facility. The work of some Italian poet was often his companion upon the circuit, and was perused

with the eagerness of youthful ardor. With the Latin classics he was familiar, and read them often; and he urged upon others the importance of recurring to their classical studies, as the best means of acquiring and preserving a pure taste and a good style.

But it was not to foreign authors alone that he was attached. The study of the English classics was a favorite pursuit. The grave disquisitions of Milton, the sound philosophy of Bacon, and the varied richness of Shakspeare, furnished materials upon which he delighted to dwell. Nor was the lighter literature of the day proscribed. Works abounding with anecdote and humor afforded favorite sources of relaxation, amid the fatigues of abstruse investigation.

It was in conversation upon topics of this kind, that we came to know and esteem the ripe scholar, and the instructive and amusing companion, in the person of the learned judge.

The great zest with which he enjoyed wit led him to commence a treatise upon it, in which he proposed to consider the various kinds of wit, and to give examples of them; but death has put an end to this undertaking ere it was matured.

Studies and amusements of this character, however, were not permitted to interfere with professional labors and official duties.

The study, and practice, and administration of the law, was the great business of his life; and to this he brought all the energies of a vigorous mind. He loved it as a science, and pursued it with delight as well as with diligence.

Having selected it for his profession, he entered upon the preparatory studies, while engaged in the business of instruction, devoting the labors of the preceptor to sustain the student; and having finished his term in the office of Samuel Dana, Esq. he established himself at Groton.

His early efforts were such as to attract the notice of chief justice Parsons, who was not only eminently qualified

to estimate professional merit, but possessed a disposition to encourage the junior members of the bar, who were struggling for eminence; and he ever retained and expressed a grateful recollection of the kindness and assistance, he had received when young, from that great man.

You of course anticipate that he soon became distinguished as a well-read and accurate lawyer. His stores of legal learning did not consist merely in a treasury of precedents and decisions, but he studied the great principles of the science; made himself an adept in special pleading, which requires not only acuteness and discrimination, but patient and laborious investigation and reflection; and to this he added diligence in the examination and preparation of the evidence, and talents as an advocate, which commanded a very respectable share of forensic practice, extending into this state.

Amply qualified to defend the case of his client, by a resort to the niceties and technicalities of the system of the common law, and calling them into requisition, when the interests of others confided to his care required them, he did not, however, delight so much in that mode of conducting legal controversies, as in the resting of a case upon its substantial merits.

It was while residing in Groton in 1811, upon the occurrence of a vacancy, that he was elected to represent his district in congress, and at the expiration of this term was re-elected—supported the administration then in power, and recorded his vote in the affirmative on the question of war with Great Britain. But although he always had a lively interest in the great political questions, which have from time to time agitated the country, political life seems not to have held out that allurement to him that it does to many others, and he resigned his seat before the expiration of the term.

In 1814, he removed from Groton to Portsmouth, in this

state, and established himself in the practice of the law there, and upon the reorganization of the judiciary in 1816 he was appointed chief justice of the superior court. Notwithstanding he had recently become an inhabitant of the state, and notwithstanding the appointment immediately succeeded a political revolution and an overthrow of a judicial system, organized but a few years before by the adverse political party—and thus might be expected to be unsatisfactory to that party—yet his previous practice had made him extensively known, his advancement to the bench soon became acceptable, and he held the office until the time of his decease.

It was in the discharge of his duties in this station, that he was known to us all. It was here that we have seen him, day after day, and term after term, laboring with untiring industry, to administer justice between contending parties. Here we saw his comprehensive mind grasp the strong points arising out of conflicting testimony and adverse argument, and witnessed the lucid manner in which he presented the case to the consideration of those who were to pronounce the verdict. Here he delivered those sound legal opinions, which exhibited the extent of his research, the strength of his judgment, and his strong desire that justice should be done. And it is in the scene of his public labors, that it becomes us to fulfil a last sad duty to his memory.

Up to the time of his appointment to the bench, although it is understood, that the decisions of a distinguished jurist, still living, have been preserved in manuscript, none had been given to the public in an authentic form in this state. Under the auspices of chief justice Richardson and his associates, Mr. Adams, who for a long period held the office of clerk of the superior court, in 1819, ushered into notice the first volume of *New Hampshire Reports*. A considerable portion of the second was drawn up by the chief jus-

tice; nearly all the cases of the third, fourth, and fifth were furnished by him; and of the matter for, perhaps, four volumes more, he has prepared a large share. His legal opinions will form an enduring memorial of his high qualifications for the station he occupied.

In addition to these, he published, during the same term, "The New Hampshire Justice," and "The Town Officer"—manuals which have been of incalculable advantage to the state; and he had also prepared for the press a treatise upon the office and duty of sheriffs.

He was, moreover, during the same period, at the head of a committee entrusted by the legislature with the duty of revising and collecting together, the provisions of different statutes upon the same subject, and of arranging and publishing a new edition of the laws.

It will not derogate from the merits of any individual, to say, that no one in the state has done so much, in the department of the law, to entitle himself to be deemed a public benefactor. Of the importance of his labors in this respect, few except the members of the profession can form an adequate conception. But it may be realized, in some measure, from the consideration, that our law is derived from the common law of England, so far as its rules are applicable to the condition of this country, and the different form of government here established, and from statutes, which, like other statutes, owing to the imperfection of human language, often admit of different constructions. Until judge Richardson took his seat upon the bench, expositions of the common law, determining how far it might be considered applicable here, and constructions of statutes which had been fixed by the decisions of the courts, rested in tradition, except so far as they were preserved in the private note-books of judges or counsel. Lawyers, often more or less perplexed by an uncertainty, respecting what may be the practical application of the principles of the science to

a state of facts to be made out in evidence, were then necessarily more ignorant of the decisions of their own courts, than of those of some other governments, having generally no means of ascertaining what had been here decided, beyond the limits of their own practice. And magistrates in the exercise of the powers conferred upon them, had still less means of forming correct judgments.

How great ought to be the meed of commendation awarded to him, who has done so much to diffuse a knowledge of sound principles, and correct practice, in a department where they are of such vital importance.

Dartmouth college appreciated his labor's upon the bench, and in 1827 conferred upon him her highest honors.

A life of professional labor furnishes but few occurrences, which to the great mass of the people would seem worthy of record. There are no startling events to excite wonder. There is nothing of "pomp and circumstance" to attract admiration. But if, on the one hand, there are no "passages of arms" to be celebrated, and no victories to be sung; on the other, the trophies are not stained with blood, and the notes of wailing and woe mingle not in the chorus.

The qualities required for successful exertion in the learned professions may, perhaps, not be inferior to those, which enable their possessor to set a squadron in the field, or to direct the array of a battle; and chief justice Richardson exhibited them in a high degree of perfection. To an unspotted integrity, and conscientious faithfulness, was added great patience—a most important qualification for such a station; and a long administration attested that he possessed it in a remarkable degree. Urbane towards the gentlemen of the bar, courteous to witnesses, and extending to litigants an impartiality which often left in doubt his opinion upon contested questions of fact; a suspicion of attempted fraud, or probability of injustice, roused him to take a decided stand in favor of that side which appeared in danger of suf-

fering wrong; and, while cautious to impress upon a jury the principle that fraud and bad faith were not to be presumed, the tones of indignation with which he denounced them, were the consequence of a deep love of justice, and desire that the right should prevail. But while he was thus firm in resisting whatever seemed to savor of injustice, the individual arraigned as a criminal was usually a subject of compassion, and his administration of that branch of judicature, was based upon the humane principle that it is better that many guilty should escape, than that one innocent person should suffer.

Notwithstanding all the divisions of parties and sects, he commanded general confidence, and his judicial character was summed up in a single short sentence, by a highly respected citizen, when he exclaimed, after musing upon the intelligence of his death—"Well, the good old judge has gone!"

How full of eulogy are these few words. His had been a long judicial life. He had held the office of chief justice nearly twenty-two years. He had lived to witness nearly two entire changes of all his associates, and he was also approaching that period—"three score years and ten"—which almost marks the limit of human activity, and with us absolutely terminates judicial labor. He might well be spoken of in connexion with the lapse of time. He was aged in the public service. And after such a period of devotion to the labors of a judicial station—after exerting the best energies of the meridian of existence in the service of his fellow-men—when he is at last called upon to surrender up the trust committed to him on earth, what could any incumbent of the bench desire from those he leaves behind, more than the character of "*the good judge.*" How much is included in it. Learning, integrity, impartiality, firmness, industry, faithfulness, patience; these are all necessary to the character of the good judge. Nay, what is not neces-

sary—what is not included in it. “Well done, good and faithful servant.” There needs nothing more of commendation.

Is any one disposed to inquire if he had no foibles. Let it be answered, none to speak of here—few to form the subject of comment elsewhere.

It is not, however, in the character of a literary student, and of a good judge, alone, that our late venerated chief justice deserves to be remembered. He was the good husband, father, and friend. At his residence in Chester, to which he removed in 1819, I have often had occasion to view him in these relations. Upon the bench, and in his intercourse with society at large, he commanded the respect and admiration, and acquired the esteem of his friends; it was in the domestic circle, and at the family fireside, that they learned to love him.

There his attachment to botany and horticulture was exhibited. There, to a limited extent, he cultivated music, for which he had a fine taste. There he exerted himself for the promotion of science and education, and the support of morals and religion. There he called his friends around him, and wit and anecdote delighted the circle, and there also they were indebted to him for counsel, instruction and assistance, which will ever be remembered with gratitude. “You have lost an associate”—says a member of the bar in a letter announcing his decease—“You have lost an associate, and I a friend whose place can never be supplied. You can conceive, though others cannot, how invaluable a friend he was to me.” The affection, and benevolence, and kindness, and simplicity of his character were there daily exemplified. Who shall enter that house of affliction and stay the sorrows of the family by which he was so fondly beloved.

A firm believer in the christian religion, although not a member of any church, its precepts were honored in the pa-

tience and resignation, with which he endured the severest dispensations, and which were evinced in that illness which resulted in death.

Soon after his elevation to the bench, a fever reduced him to the confines of the grave, and after having apparently destroyed all vitality except a last fluttering respiration, left him to a protracted recovery, and to remain crippled for life. In after years, the visitation of severe nervous affections and spasms, caused great suffering, and at times incapacitated him for business. And yet during an intimate acquaintance of years, I do not recollect to have ever heard a murmur fall from his lips on account of his deprivation, and scarce an expression of impatience during periods of agony. Patience and fortitude seemed to have, with him, their perfect work. And when disease assumed another form, and the king of terrors finally asserted his jurisdiction, I am assured that he "repeatedly expressed his gratitude, that he had felt so little anxiety of mind"—"throughout declared himself perfectly willing to live or die, as should be decreed"—"retained his usual kindness of feeling, and his usual interest in the welfare of his friends"—and "met his fate with philosophic resignation."

Such is a brief and imperfect sketch of the character of **WILLIAM MERCHANT RICHARDSON.**

## JURISPRUDENCE.

## I.—DIGEST OF ENGLISH CASES.

## COMMON LAW.

Selections from 5 *Adolphus and Ellis*, Parts 2 and 3; 1 *Neville and Perry*, Part 1; 3 *Bingham*, Part 5; 4 *Scott*, Parts 2, 3, and 4; 2 *Meeson and Welsby*, Parts 5 and 6, and 3 same, Part 1; 5 *Dowling's Practice Cases*, Part 5, and 6 same, Part 1.

**ARBITRATION.** (*Certainty of award.*) In a dispute on a building contract, arbitrators were to award on certain alleged defects in the building, on claims for extra work, and on deductions for omissions; and to ascertain what balance, if any, might be due to the builder. An award, ordering a gross sum to be paid to the builder, without any decision on the alleged defects, was held bad. *In the matter of Rider*, 3 *Bing. N. C.* 874.

**2 (Costs—Excess of authority by the arbitrator.)** If by the submission the costs of a reference are to abide the event, it is an excess of jurisdiction for the arbitrator to determine the amount.

If an arbitrator directs mutual releases on payment of a sum of money, over which he has jurisdiction, as well as of a sum over which he has none, the award is good as to the former. *Kendrick v. Davies*, 5 *D. P. C.* 693.

**ARREST.** (*Privilege from.*) A party to a reference, who, after the adjournment of the hearing of it to a subsequent day, does not, within a reasonable time, return home, for want of pecuni-

ary means, is not privileged from arrest during the period of adjournment. (The adjournment was from the 7th of January to the 15th of February, and the opposite party had given notice that they would not proceed with the reference, but would apply to the court in Hilary Term to set it aside. The defendant remained in London till the 16th January. This was held an unreasonable time.) *Spenceer v. Newton*, 1 N. & P. 818.

**BILLS AND NOTES.** (*Right of indorsee v. indorser of note.*)

The indorser of a *promissory note* does not stand in the situation of maker relatively to his indorsee. Therefore, the indorsee cannot declare against the indorser as maker, even though he has indorsed a note not payable or indorsed to him, and where, consequently, his indorsee cannot sue the original maker. (1 C. M. & R. 439; 2 Bing. N. C. 249.) *Gwinnell v. Herbert*, 5 Ad. & E. 436.

2. (*Presentment of accommodation bill.*) Want of effects in the hands of the acceptor excuses the holder of an accommodation bill from presenting it for payment, as well as from giving notice of its dishonor. (2 H. Bl. 336; 15 East, 275.) *Terry v. Parker*, 1 N. & P. 752.
3. (*Notice of dishonor.*) The drawer of a bill, being asked if he was aware that the bill had been dishonored, answered, "Yes; I have had a very civil letter from Mr. G. (an intermediate indorsee) on the subject; and I will call and arrange it:" Held, in an action against the drawer, that this admission relieved the plaintiff from the necessity of proving a regular notice of dishonor. *Norris v. Salomonson*, 4 Scott, 257.
4. (*Liability of drawer of bill in name of a firm.*) Three persons carried on business as partners, under the firm of J. B. & son: two of the partners died, and the surviving partner employed the defendant, who had previously acted as a clerk to the firm, to wind up the affairs. In this character the defendant attended the warehouse, and transacted business with different parties on account of the firm. Under these circumstances, the defendant using and signing the name of the firm, drew upon J. H., a debtor to the firm, a bill of exchange, which J. H. accepted: Held that the defendant was not liable as the drawer

in an action upon *the bill*, his name not being affixed to it, without some proof that he had no authority to draw bills in the name of the firm, or that he had not acted *bonâ fide*.

*Quære*, whether, if it had been proved that he had no such authority, he would have been liable in an action upon *the bill*. (3 B. & Ad. 114.) *Wilson v. Barthrop*, 2 M. & W. 863.

**DEATH, PRESUMPTION OF.** When a party has been absent seven years without having been heard of, the presumption of law then arises that he is dead; but there is no legal presumption as to the *time* of his death. *Nepean v. Doe d. Knight*, 2 M. & W. 894.

**ESTOPPEL.** J. B., in 1827, conveyed lands in fee to L., and J. B.'s wife was a party to the conveyance. At the time of its execution, it was agreed that J. B. should continue to occupy until he or L. died. L. died, and his heir gave J. B. notice to quit. A few days after it expired, J. B. died, and his widow continued in possession. In ejectment brought by the heir of L. against the widow: Held, that she could not set up a prior mortgage of the lands by J. B., for her possession accrued under him, and she was therefore estopped by the conveyance of 1827. (3 M. & S. 271; 2 Ad. & E. 14.) *Doe d. Leeming v. Skirrow*, 2 N. & P. 123.

**EVIDENCE.** (*Comparison of handwriting.*) The defendant in ejectment produced a will, and on one day of the trial (which lasted several days) called an attesting witness, who swore that the attestation was his. On his cross-examination, two signatures to depositions respecting the same will in an ecclesiastical court, and several other signatures, were shown him, (none of them being in evidence for any other purpose in the cause), and he stated that he believed them to be his. On the following day, the plaintiff tendered a witness to prove the attestation not to be genuine. That witness was an inspector at the Bank of England, and had no knowledge of the handwriting of the alleged attesting witness, except from having, previous to the trial, and again between the two days, examined the signatures admitted by the attesting witness, which admission he had heard

made in court. Lord Denman, C. J., and Williams, J., were of opinion that such evidence was receivable; Patteson and Coleridge, Js., that it was not. *Doe d. Mudd v. Stickermore*, 5 Ad. & E. 703; 2 Nev. & P. 16.

**EXECUTOR AND ADMINISTRATOR.** (*Liability for funeral of intestate.*) The defendant, before taking out letters of administration to an intestate, sanctioned an expensive funeral, which a relation had ordered for the deceased: Held, that the defendant, after taking out administration, was liable in his capacity of administrator for this expense. *Lucy v. Walrond*, 3 Bing. N. C. 841.

**FRAUDS, STATUTE OF.** (*Undertaking to answer for debt of another.*) The plaintiff having issued execution against L. for debt, L., with the plaintiff's assent, conveyed all his property to the defendant, who thereupon undertook to pay the plaintiff the debt due from L., the plaintiff withdrawing the execution: Held, that the defendant's undertaking was not an undertaking to pay the debt of a third person, within the meaning of the statute of frauds. (1 Wils. 305.) *Bird v. Gammon*, 3 Bing. N. C. 883.

**FREIGHT.** Where a ship is chartered to bring home a cargo of enumerated articles, at rates of freight specified for each, which articles are not provided by the charterer, the freight must be paid upon average quantities of all the articles, whether the ship return empty, or laden with a cargo of articles different from those enumerated. (2 Stark. N. P. C. 450.) *Capper v. Forster*, 3 Bing. N. C. 938.

**GUARDIAN.** (*Right to custody of infant.*) H., the father of two children, on his wife's death, requested her father and mother to come from America, where they were settled, and then take charge of the children. They did so. Four years afterwards H. died, having made his will the day before, by which he left his property to trustees, to be converted into money and divided between his two children when of age, the interest to be applied by the trustees for their education, &c. in the mean time; and he appointed the trustees guardians of the per-

sons and estates of the children, and requested them to cause them to be properly educated. Certain stock was vested in other trustees for the benefit of the children, under the testator's marriage settlement. No real property passed to them by the will. The grandfather and grandmother refused to deliver up the children when demanded by the guardians. The court, on habeas corpus, ordered them to do so. *Rex v. Isley*, 5 Ad. & E. 441.

**INSURANCE.** (*Breach of warranty against working cotton-mill by night.*) In a policy of insurance against fire on cotton-mills, there was a warranty that the mills were brick built, and warmed and worked by steam, lighted by gas, and *worked by day only*: Held, that this stipulation meant only that the usual cotton manufacture carried on by the mills in the day time, should not be carried on in the night; and that it was no breach of the warranty, that, on one occasion, in order to turn machinery in an adjacent building, the steam-engine, (which was not in the mill, but in an adjoining building), and certain perpendicular and horizontal shafts in the mill, (which were averred in a plea to be "respectively parts of the said mill,") were at work by night. (See *Whitehead v. Price*, 2 C. M. & R. 447, a case which arose on another policy on the same mills.) *Mayall v. Milford*, 1 N. & P. 732.

**INTEREST.** (*Goods sold to be paid for by bill.*) Where goods are sold and delivered, to be paid for by a bill at a certain date, if the bill be not given, interest on the price, from the time when the bill would have become due, may be recovered as a part of the estimated value of the goods, on the common count for goods sold and delivered. (13 East, 98.) *Farr v. Ward*, 3 M. & W. 25.

**LIBEL.** (*Publication of proceedings in court of justice.*) A publication of proceedings in a court of justice cannot be justified, if it contain disparaging observations on the plaintiff made by any other than a judge of the court. (5 Bingh. 405.)

And it is no justification of such publication, to plead that the proceedings took place, unless it be also alleged that the charges

were true, or that the publication is a true and accurate account of the proceedings. *Delegal v. Highley*, 3 Bing. N. C. 950.

**LIMITATIONS, STATUTE OF.** (*Acknowledgment.*) The following letter was held a sufficient acknowledgment to revive a debt barred by the statute :—“ I wish to comply with your request, for I am very wretched on account of your account not being paid : there is a prospect of an abundant harvest, which must turn into a goodly sum, and considerably reduce your account, if it does not, the concern must be broken up to meet it ; my hope is, that out of the present harvest you will be paid.” And the amount of the debt may be proved by extrinsic evidence. (1 C. & M. 623.) *Bird v. Gammon*, 3 Bing. N. C. 183.

**MALICIOUS PROSECUTION.** (*Justification.*) A plea to an action for a malicious charge before a magistrate, justifying on the ground that the plaintiff had committed the offence imputed to him, must allege that at the time of the charge the defendant had been informed of or knew the facts on which the charge was made. *Delegal v. Highley*, 3 Bing. N. C. 950.

**MASTER AND SERVANT.** (*Determination of yearly hiring.*) A contract to serve, as reporter to a newspaper, for one whole year from a certain day, and so from year to year to the end of each year commenced, so long as the parties should respectively please : Held to be a yearly service so long as it lasted, and not determinable except at the end of any current year. (4 Bing. 309 ; 5 B. & Ad. 904.) *Williams v. Byrne*, 2 N. & P. 139.

**RESTRAINT OF TRADE.** Held by the Exchequer Chamber, reversing the judgment of the K. B., that an agreement in partial restraint of trade is not void by reason of the party’s being thereby restrained from exercising his business in a particular place for his life, and notwithstanding the death of the other party. (1 P. Wms. 181 ; Noy, 98 ; 2 Str. 739 ; 5 T. R. 118 ; 4 East, 190 ; 3 Bing. 322 ; 7 Bing. 735 ; 1 C. & J. 331.) *Hitchcock v. Coker*, 1 N. & P. 796. [See *Wallis v. Day*, 2 Mee. & W. 273.]

**SLANDER.** (*Of attorney.*) These words,—“ He has defrauded his creditors, and has been horse-whipped off the course at

Doncaster,"—spoken of an attorney, held not actionable, unless spoken of him in his profession. (Com. Dig. Action on the Case for Defamation, D. 27; 2 Ld. Raym. 1480.) *Doyley v. Roberts*, 3 Bing. N. C. 835.

**STATUTE.** (*Effect of repeal of.*) To a declaration for goods sold, the defendant pleaded, according to the 23 G. 2, c. 27, s. 8, (Westminster Court of Requests Act), that the defendant was indebted in a less sum than 40s., and that he was an inhabitant and resident within the city of Westminster. Replication, that the defendant was indebted in the sum of 40s. At the trial the jury found for the defendant. The statute 23 G. 2, c. 27, was repealed by 6 & 7 Will. 4, c. 137, after plea pleaded, and before trial: Held that the plaintiff was entitled to judgment non obstante veredicto. *Warne v. Beresford*, 2 M. & W. 848.

**TENDER.** (*When unnecessary.*) A tender of payment by a purchaser, in order to obtain an article purchased, is unnecessary where the vendor admits that the tender would be fruitless. *Jackson v. Jacob*, 3 Bing. N. C. 869.

**VENDOR AND PURCHASER.** (*When time of essence of the contract.*) The day for the completion of the purchase of an interest in land, inserted in a written contract, cannot be waived by oral agreement, and another day substituted in its place. (2 Atk. 383; 17 Ves. 356.)

The failure to procure from the lessor a license to assign, or to register previous assignments, before the day on which it is agreed to assign and give possession, is not a breach of the agreement. *Stowell v. Robinson*, 3 Bing. N. C. 928.

**WITNESS.** (*Commission for examination of witnesses abroad—proceedings of, how far evidence.*) A commission to examine witnesses at Hamburg was directed to the judges of the chamber of commerce there, or any two of them, who were directed to take the examinations in writing, and to send the same to the court of K. B. under their seal. The original examinations were taken down by an officer of the chamber of commerce, appointed for that purpose, and were entered by him in the min-

utes of the court, and these were signed by the judges: Held, that a copy of the examinations attested by the above officer, and under the seal of the chamber of commerce, was not a proper return, nor receivable in evidence.

*Seems*, that when a commission to examine foreign witnesses is issued to another country, their answers returned to the court here must be in English. *Clay v. Stephenson*, 2 N. & P. 189.

**WORK AND LABOR.** The defendants employed K. to draw a specification of a building proposed to be erected. K. employed the plaintiff to make out the quantities; which work was to be paid for by the successful competitor for the building contract: Held, that they were liable to the plaintiff for making out the quantities. *Moon v. Guardians of the Witney Union*, 3 Bing. N. C. 814.

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#### EQUITY.

Selections from 10 Bligh, N. S. Parts 1 & 2; 2 Mylne & Craig, Part 3; 1 Keen, Part 3; 7 Simons, Part 4.

**AGREEMENT.** (*Right to partial performance of.*) A tenant for life under a settlement, with an ultimate reversion to himself in fee, enters into an agreement by himself as absolute owner to sell part of the settled land. This agreement, the trustees of the settlement, who had a power to sell at the request and by the direction of the tenant for life, refused to adopt. Upon a bill filed against them and the tenant for life, it being held that the court could not control the discretion of the trustees, a decree against the tenant for life for such performance as was in his power, was refused, on the ground that it would be prejudicial to the other parties interested in the settlement. *Thomas v. Dering*, 1 Keen, 729.

2. (*Statute of frauds—Agreement by letter.*) Letters may be sufficient to constitute a binding contract, though they refer to the intended execution of a more formal instrument. *Ib.*

**BONUS.** (*Whether capital or interest.*) Shares in the London Assurance Company were, upon marriage, settled for life, with remainder over, and it was provided that if any bonus should be given by way of increase of the capital of the stock, it should be added to the capital settled; but if by way of interest or dividend, it should go to the person entitled to the interest of such capital. At a meeting of the company, after voting the usual dividend, it was resolved, that a further sum of 12*l.* per share should be taken out of the rents and profits, and divided amongst the proprietors. Held, that the bonus on the settled shares was to be added to the trust fund. *Ward v. Combe*, 7 Sim. 634.

**CHARGE.** (*Of debts and legacies by will.*) A testator directed debts and legacies to be paid within six months after his decease, and then gave all the rest and residue of his estate, real and personal: Held, that the debts and legacies were charged upon the land. *Mirehouse v. Scaife*, 2 M. & C. 695.

**CHARITY.** (*Cy pres—Refunding.*) A testatrix, in 1680, devised an estate subject to a rent charge in fee, given by her will to another person, which by another paper she declared to be in trust as to the greater part thereof, for the maintenance of a catholic priest, who was before spoken of as being entertained for the maintenance of poor catholics. Upon an information being filed, (before the passing of 2 & 3 W. 4, c. 115, legalising bequests for the support of the catholic religion): Held, that the above purpose was illegal and void, but that the purpose being in its nature charitable, that part of the rent charge which had been given towards it, was applicable *cy pres* to a charitable purpose to be appointed by the crown.

Held, also that a person who had purchased the estate with a knowledge of the charge, but who had ever since refused to pay it, was chargeable with the arrears from the time of the purchase; such arrears extending over a period of nine years to the time of filing the information.

Whether the act, 2 & 3 W. 4, c. 115, has a retrospective effect, *quare?* *Attorney General v. Todd*, 1 Keen, 803.

**DOWER.** (*Annuity.*) Where a testator devised *all and singular* his freehold and copy-hold estates upon certain trusts for the benefit of his family, subject to an annuity to his wife during widowhood, and bequeathed to her the use of his household goods and furniture, also during widowhood: Held, that she was entitled both to the annuity and to her dower. *Dowson v. Bell*, 1 Keen, 731.

**2. (Annuity—Surplus.)** Where a testator gave an annuity to his wife during widowhood, out of the rents and profits of *all* his real estate, and directed that after providing also thereout for the maintenance and education of his son, the *surplus* of such rents and profits should accumulate for the benefit of such son: Held, that the case was distinguished from that of *Jones v. Collyer*, (Amb. 730), by reason of the annuity being charged upon all the real estate, and that the widow was entitled both to the annuity and her dower. *Harrison v. Harrison*, 1 Keen, 765.

**FRAUD.** (*Patient and medical adviser.*) The principle upon which the court deals with transactions between solicitor and client applies also to other cases of confidential relationship. Thus where a medical attendant had obtained from an aged patient an agreement to pay him 25,000*l.* after death in consideration of his past and future services, which services were continued for several years afterwards, and until the death of the patient: Held, that such agreement was void upon the above equitable ground, and it was intimated by the court that it was void even at law, on the ground of public policy, as giving to the medical attendant an interest in the death of his patient. *Dent v. Bennett*, 7 Sim. 539.

**LEGATEE.** (*Misdescription of.*) The description of a legatee by a wrong character, where there is no question as to his identity, will not affect his right to the legacy, unless the character attributed to him was assumed for the purpose of deceiving the testator.

Where a testator gave a legacy to a person whom he described as his widow, but who, it afterwards appeared, was previously

married to a person still living at the time of the suit, the testator having had, at the time of his supposed marriage, the same reason as the legatee for supposing that her real husband was alive, the legacy was held good. *Giles v. Giles*, 1 Keen, 685.

**PARTIAL INSANITY.** (*Evidence of.*) Where a transaction is impeached on the ground of unsoundness of mind, proofs of general sanity are of themselves no sufficient answer to alleged indications of insanity on other points. *Steed v. Calley*, 1 Keen, 620.

2. (*Effect of, coupled with confidence.*) What degree of weakness of intellect in a donor is sufficient when coupled with the fact of habitual confidence reposed by him in the donee to avoid a gift, considered. *Ib.*
3. (*Effect of, on dealing with third party.*) Where the gift was set aside, a transaction on which it was founded, being a purchase by the donor from a third party for the purposes of the gift, was also rescinded. *Ib.*

**SECRET TRUST.** (*Promise by devisee.*) Testator gave all his real and personal estate to his wife absolutely, adding these words, "having a perfect confidence that she will act up to those views which I have communicated to her, in the ultimate disposal of my property after her decease." The wife died intestate, and a bill was filed by two natural children of the testator against her heir and administrator, and against the heir and next of kin of the testator, to establish a secret trust on behalf of the plaintiffs, on the ground of a promise given by the wife, when the will was made, that she would dispose of the whole of the property in favor of them. Nothing, however, was proved beyond a promise to give an *uncertain* quantity, if the plaintiffs were respectable: Held, that the circumstances were not sufficient to raise a trust, though it was said by the court, that it would have been otherwise if the case stated by the bill had been made out.

No objection was taken on the ground of the trust being set up after the death of the alleged trustee: nor was any notice taken in the judgment of a claim set up by the next of kin of

the testator, who contended that the devise to the wife was for life only. *Podmore v. Gunning*, 7 Sim. 644.

**TRUSTEE.** (*Discharge of costs.*) The trustees of a settlement applied to be discharged from their trust, on the ground of the unexpected responsibility thrown upon them, by the repeated charges and annuities to which the tenant for life had subjected his interest, and also stating, which was admitted, that they had applied to the tenant for life to appoint new trustees in their room, which he had failed to do: Held, that the costs of obtaining the discharge should be paid out of the interest of the tenant for life. *Coventry v. Coventry*, 1 Keen, 758.

2. (*Trustees with power of sale.*) Trustees who have a power of sale, at the request and by the direction of the tenant for life, have a discretion as to the exercise of that power which the court will not control. *Thomas v. Dering*, 1 Keen, 729.

**WILL.** (*Construction—Exception from previous gift annulled by general bequest.*) A testatrix gave to her niece, among other things, all her coins in and about her dwelling-house, *except* those of the two last and present kings, and also gave her a pecuniary legacy. She also gave to another person specifically some of the property in the same house. She then made a general residuary bequest to another person *except* as otherwise disposed of, and then gave to her niece all her property in and about her said dwelling-house *except* what she had otherwise given. A variety of guineas and sovereigns of the three reigns specified in the exception were found in the house: Held, that they passed by the general bequest of all property in the house. *Brooke v. Turner*, 7 Sim. 671.

2. (*Property in and about a house.*) Held, that by the description of "all the property over which I have any disposing power in and about my said dwelling-house," securities for money, promissory and country bank-notes, did not pass, but that Bank of England notes do pass. (*Popham v. Lady Aylesbury*, 1 Amb. 68. See also 15 Ves. 326, 327). *Ib.*

## II.—DIGEST OF AMERICAN CASES.

Selections from R. M. Charlton's (Georgia) Reports; 1 Shepley's (13 Maine) Reports; 12 Peters (U. S.); 2 Wharton (Pennsylvania).

**ACTION ON THE CASE.** (*False imprisonment.*) Where one, through his own error, mistake or negligence, causes the arrest and imprisonment of an innocent man, who has given no occasion for suspicion by his own misconduct; the assurance of the complainant, however strong it may be, that the accused was guilty of the crime imputed to him, is not sufficient evidence of probable cause for such arrest. *Merriam v. Mitchell*, 1 Shepley, 439.

**AMENDMENT.** (*By officer.*) An officer will not be permitted to amend a return of an attachment of real estate upon a writ by altering the date thereof, when the rights of third persons have intervened. *Berry v. Spear*, 1 Shepley, 187.

2. (*By town clerk.*) Where a town clerk has made an erroneous record of a vote, it is competent for him, while in office, to amend it according to the truth. *Chamberlain v. Dover*, 1 Shepley, 466.

**ATTORNEY.** (*Responsibility for.*) A party is responsible for the acts of the attorney of record regularly employed by him in the case. *Fling v. Trafton*, 1 Shepley, 295.

**BAILMENT.** (*Negligence.*) In an action against a bailee, the question of negligence is a question of law for the court to determine. *Morel v. Roe*, Charlton, 19.

2. (*Same.*) But the facts from which it is, or is not inferred, must be found by the jury. *Ib.*

3. (*Carrier.*) In contracts for conveying goods on freight, there is an implied undertaking by the carrier, that he has a competent knowledge of the navigation, and he will be liable for a loss, occasioned by a want of such knowledge. *Ib.*

**BANKS.** (*Purchase of stock by.*) If the capital of a bank can-

not be usefully employed in loans, there can be no objection to investing a portion thereof in the purchase of its own stock. And the directors of the bank have a right to dispose of the stock so purchased by them. *Hartridge and another v. Rockwell and another*, Charlton, 260.

**BILLS OF EXCHANGE, AND PROMISSORY NOTES.** (*Discharge of indorser.*) The omission by the indorsee and holder of a note to charge in execution a prior indorser, (who had been surrendered by his bail before judgment, and discharged in consequence of such omission), will not operate to discharge a subsequent indorser from his liability to such holder. *Wakefield v. Lambert*, Charlton, 13.

2. (*Delay by payee.*) Mere delay by the payee, after a note falls due, in enforcing payment against the principal, without binding himself to give further time, does not discharge a surety. *Freeman's Bank v. Rollins*, 1 Shepley, 202.
3. (*Receipt of interest by payee.*) The receipt of interest for a stipulated time in advance from the principal by the payee, after the note has become payable, is not evidence of an agreement to give further credit thereon ; and does not discharge the surety. *Ib.*
4. (*Damages.*) A bill of exchange accepted, and indorsed by citizens of Kentucky, and there negotiated, payable at New Orleans, is not, by force of the statute of Kentucky of 1798, subject to the payment of ten per cent. damages. *The Bank of the United States v. Daniels*, 12 Peters, 32.
5. (*Foreign bill.*) A bill of exchange drawn in one state of the United States, on a person in another state, and payable there, is a foreign bill. *Ib.*
6. (*Same.*) Where a bill was drawn in Kentucky on a person in Kentucky, and accepted, payable in New Orleans, the acceptor is liable to the contract to the same extent as he would have been if he had accepted the bill in Louisiana. As a foreign bill, the holders were entitled to re-exchange, by commercial usage, when the protest for non-payment was made. *Ib.*
7. (*Order on postmaster general.*) An order drawn by a con-

tractor on the postmaster general, in the following words : "Sir,—On the first day of January, 1836, pay to my order \$5000, for value received, and charge the same to my account, for transporting the United States mail, and oblige your friend, J. R."—was held not to be a negotiable bill of exchange, so as to entitle the holder to sue in his own name. *Reeside v. Knox*, 2 Wharton, 233.

8. (*Giving time by holder.*) Where the holder of a promissory note, on the day that it became due, accepted from the maker a check drawn upon a bank, by a firm consisting of the maker and a third person, dated six days afterwards, which check was to be in full satisfaction of the note, in case it was paid at maturity ; it was held that this amounted to a suspension of the remedy against the maker, and discharged the indorser. *Okie v. Spencer*, 2 Wharton, 253.
9. (*Remedy of indorser.*) The payee and indorser of a promissory note, who indorsed it for the accommodation of the maker, and without any consideration between them, and who afterwards was compelled to pay the amount to the holder, cannot recover from the maker on any of the money counts in *indebitatus assumpsit*, but must sue on the note : and if more than six years have elapsed between the time at which the note fell due and the commencement of the action, he cannot recover, although he may have paid the amount to the holder within six years. *Kennedy v. Carpenter*, 2 Wharton, 344.
10. (*Death of one joint indorser.*) If one or two joint payees and indorsers of a note, discounted for the accommodation of the maker, die before the note falls due, his representatives are not liable to the holder for any part of the amount. *Ib.*
11. (*Same.*) Where a note was made by the defendant in favor of A. and B., and jointly indorsed by them for the accommodation of the defendant, and the proceeds of the note, which was discounted by a bank, went to the credit of the defendant, and A. died before the note became due, and his administrators paid one half of the amount to the bank, B. paying the other half ; it was held, that the administrators could not recover the amount

so paid by them ; the payment having been voluntary, and in their own wrong. *Kennedy v. Carpenter*, 2 Wharton, 344.

**BILL OF SALE.** (*Mark for name.*) Under the laws of Louisiana, and the decisions of the courts of that state, a mark for the name, to an instrument, by a person who is unable to write his name, is of the same effect as a signature of the name. *Zacharie and Wife v. Franklin and Wife*, 12 Peters, 151.

2. (*Synallagmatic contract.*) A bill of sale of slaves and furniture, reciting that the full consideration for the property transferred had been received, and which does not contain any stipulations or obligations of the party to whom it is given, is not a synallagmatic<sup>1</sup> contract, under the laws of Louisiana ; and the law does not require that such a bill of sale shall have been made in as many originals as there were parties having a direct interest in it, or that it should have been signed by the vendee. *Ib.*

**BONDS.** (*Securities of obligor.*) The failure of the obligee, to notify to the securities of the obligor the delinquency of their principal, as soon as discovered, will not relieve them from their obligation, *Planters' Bank v. Lamkin*, Charlton, 29.

**CHALLENGE FOR CAUSE.** (*Former peremptory challenge.*) The prisoner, on being put upon his trial, challenged a juror *peremptorily*, and he was set aside. The jury, after hearing the evidence, not being able to agree, were discharged by consent. The prisoner was again put upon his trial at the same term, and one of the jurors whom he had challenged *peremptorily* at the former trial, being again presented to him, was challenged by him *for cause*, and the cause assigned was, that he had set him aside *peremptorily* on the former trial, and thereby created a prejudice on his mind. Held, that it was not a good challenge *for cause*. *State v. Henley*, Charlton, 505.

<sup>1</sup> We have taken the liberty to correct Mr. Peters's spelling of this word, (*cynalagmatic*, pp. 151 and 162), for which we can perceive no authority, either in the Greek, from which the term is derived, or in the French word *synallagmatique*, from which it is adopted into the Louisiana code. In the argument of counsel for the plaintiffs, (p. 157), it is spelt *synalagmatic*.

**CHANCERY.** (*Bar to proceedings in by judgment at law.*) An action was brought by one, who had been under guardianship, as a spendthrift, against his former guardian, in the name of the judge of probate upon the guardianship bond, in which action it was alleged, that the guardian had conducted unfaithfully and fraudulently in the sale of the real estate of the ward, sold at public auction for the payment of his debts ; that the guardian had become the purchaser of the estate, and had sold it again at an advance ; and that this advance should have been for the benefit of the ward, and should have been credited in the guardian's account. This action was tried upon the merits, a verdict was found for the defendant, and judgment was rendered thereon. Afterwards, the spendthrift brought a bill in equity, against the guardian, charging the same facts without imputing fraud, and claiming the difference between the purchase and sale, as a trust ; to which the guardian pleaded the former judgment in bar. On demurrer, this was held a good plea. *Emery v. Goodwin*, 1 Shepley, 14.

**COMPOSITION WITH CREDITORS.** (*Performance of condition.*) It is generally true in cases of composition, that the debtor who agrees to pay a less sum in the discharge of a contract, must pay punctually. If the agreement stipulates for partial payments, and the debtor fails to pay, the condition to take part is broken, the second contract forfeited ; and is no bar to the original cause of action. *Clarke and another v. White*, 12 Peters, 178.

2. (*Same.*) In a composition for a debt, by which one party agreed to deliver goods to the amount of seventy per cent. in satisfaction of a debt exceeding ten thousand dollars, and omitted to deliver within one dollar and forty-one cents of the amount ; the mistake is too trivial to deserve notice. *Ib.*
3. (*Underhand agreement.*) If, upon failure or insolvency, one creditor goes into a contract of general composition common to the others ; at the same time, having an underhand agreement with the debtor, to receive a larger per cent. ; such agreement is fraudulent and void. *Ib.*

4. (*Same.*) The rule cutting off underhand agreements in cases of joint and general compositions, as a fraud upon the other compounding creditors, and because such agreements are subversive of sound morals and public policy ; has no application to a case where each creditor acts not only for himself, but in opposition to every other creditor : all equally relying on their vigilance to gain a priority, which, if obtained, each being entitled to have satisfaction, cannot be questioned. *Ib.*

CONSTITUTIONAL LAW. (*Duties.*) An ordinance of the city council of Savannah, passed under the authority of an act of the legislature of Georgia, imposed a tax on all goods, &c. not the produce of the state, sold on commission by any person residing within the city : held, that such tax was not an impost or duty on imports, but that it was a legitimate exercise of the power of a state to regulate its internal commerce. *Cumming v. Mayor and Aldermen, &c.*, Charlton, 26.

2. (*Bill of credit.*) A bank bill, issued by an institution taking its franchises from state authority, for the mere legal conveniences of a corporate body, is not a bill of credit, within the inhibition of the constitution of the United States. *State v. Calvin and another*, Charlton, 151.

3. (*Pilotage.*) The states retain the power to legislate upon the subject of pilotage, within their own territories and over their own citizens, unless such legislation interfere with, or is contrary to an act of congress, passed in pursuance of the constitution. *Low v. Commissioners of Pilotage*, Charlton, 302.

4. (*Contract.*) A state law which impairs the obligation of a contract, made prior to its passage, is unconstitutional and inoperative. *Forsyth v. Marbury*, Charlton, 324.

5. (*Same.*) And it is equally so, whether the contract exists in its original shape, or has been merged in a judgment. *Ib.*

6. (*Statute of limitations.*) A statute of limitations, to be constitutional and operative, must give an allowance of time *in futuro*, to commence the action. *Ib.*

7. (*Levy on property.*) A law which prohibits a levy on a portion of the debtor's property, previously subject to an existing judg-

ment, is unconstitutional, as it impairs the obligation of a contract. *Ib.*

8. (*Inspection laws.*) Inspection laws may be constitutionally applied, not only to the produce of the country to be exported, but to imports brought in for the purpose of sale within the state. *Green v. Mayor and Aldermen of Savannah*, Charlton, 368.

9. (*Proof of judicial proceedings.*) So much of the act of congress of 27th March, 1804, as extends the provisions of the act of 1790, (regulating the mode of proving in one state the judicial proceedings, &c. in another state), to the territories of the United States, so as to prescribe the mode of proof, or the effect to be given to a judgment of a court of a territory, in the courts of a state, is unconstitutional. *Seton v. Hanham*, Charlton, 374.

**CONVEYANCE.** (*Stake and stones.*) Where a stake and stones are referred to, as a monument, in a deed or levy, parol proof is admissible to show their location. *Wing v. Burgis*, 1 Shepley, 111.

2. (*Reservation of timber.*) By a reservation in a deed of "all the pine timber on said land above the size of ten inches in diameter, twenty feet from the stump," such timber trees continue the property of the grantor, while they remain, with the right in so much of the soil, as is necessary to sustain them. *Howard v. Lincoln*, 1 Shepley, 122.

3. (*Boundary.*) In a conveyance, where the land is bounded on a pond, the grant extends only to the margin of the pond. *Bradley v. Rice*, 1 Shepley, 198.

4. (*Same.*) And in such case, the grant is limited by the margin of the pond, as it existed at the time of the conveyance; whether it was then in its natural state, or raised above it by a dam, or depressed below it by the deepening of its outlet. *Ib.*

5. (*Terms of exclusion.*) *To, from, or by*, are terms of exclusion, unless by necessary implication they are manifestly used in a different sense. *Ib.*

6. (*Description by number.*) Where the number of the lot on a plan referred to in the deed is the only description of the land conveyed; the courses, distances and other particulars in that

plan are to have the same effect, as if recited in the deed. *Thomas v. Patten*, 1 Shepley, 329.

7. (*Survey and plan.*) It is a well settled rule, that where an actual survey was made, and monuments were marked or erected, and a plan was afterwards made, intended to delineate such survey; and there proves to be a variance between the survey and the plan, that the survey must govern. *Ib.*

8. (*Same.*) But no such rule of construction has obtained, where the survey was subsequent to the plan. *Ib.*

9. (*Proprietors' vote.*) A vote of the proprietors, that a specified portion of their common lands, be sold by their standing committee at public or private sale, and that a deed thereof be given to the purchaser by their clerk, approved by the committee, is a mere authority to sell, and does not convey the land without a deed. *Thorndike v. Richards*, 1 Shepley, 430.

**CO-PARTNERSHIP.** (*Levy on property of.*) A creditor who has obtained judgment against one co-partner in his individual capacity, which judgment was anterior to the co-partnership, has the right to levy on the partnership effects and to sell his debtor's interest therein, without reference to the claim of the creditors of the firm. *Ex parte Stebbins and Mason*, Charlton, 77.

2. (*Power of attorney.*) If on the dissolution of a firm, power be given to one partner to collect the debts thereof, such partner may execute a power of attorney for self and partners, for the purpose of authorizing a third person to collect the same. *Nichols and another v. Dennis and another*, Charlton, 188.

**CORPORATIONS.** (*Franchises.*) Private corporations cannot be deprived of their franchises, but by a judicial judgment upon a *quo warranto*, but public corporations, created for the purposes of city government, may be controlled, and have their constitutions amended and altered by the legislative power. *State v. Mayor and Aldermen of Savannah*, Charlton, 250.

2. (*Political.*) A political corporation, created for the purposes of municipal government, is liable to the superintendence and control of the legislature, which may enlarge, modify, change

or restrain its charter. *Mayor and Aldermen, &c. v. President, &c. of Steamboat Company*, Charlton, 342.

**CRIMINAL LAW.** (*Fugitives.*) A person charged with a felony in another state, and fleeing to Georgia, may, upon a principle of comity between sovereign states, be detained for a reasonable period, for the purpose of affording an opportunity to the proper authority, to demand the prisoner. *State v. Howell*, Charlton, 120.

2. (*Felony.*) Felony, in Georgia, is the commission of a crime, which subjects to infamous punishment. *A. v. B.*, Charlton, 228.

3. (*Same.*) Forfeiture of lands or goods is not, in Georgia, a component part of the punishment of felony. *Ib.*

**DEED.** (*Testimony of subscribing witness.*) Where a deed appeared to have been executed more than thirty years before the trial ; and where the only subscribing witness testified, that at the time of the date he subscribed his name as a witness to the deed in the presence of both parties, but could remember no other circumstance taking place at the time ; and where subsequently the deed was in the possession of the grantee ; it was held, that there was sufficient evidence of its execution and delivery. *Lawry v. Williams*, 1 Shepley, 281.

2. (*Same.*) A deed, although not acknowledged or recorded, is good against the grantor or his heirs. *Ib.*

**DONATIO CAUSA MORTIS.** (*When good.*) To constitute a good *donatio causa mortis*, it is not necessary that the donor should be in such extremity as is requisite to give effect to a nuncupative will. *Nicholas v. Adams*, 2 Wharton, 17.

2. (*Subsequent will.*) The making of a will, after an alleged *donatio causa mortis*, is not conclusive against the donee. *Ib.*

**DISTRICT OF COLUMBIA.** (*Control of Congress.*) There is, in the district of Columbia, no division of powers between the general and state governments. Congress has the entire control over the district, for every purpose of government ; and it is reasonable to suppose, that in organizing a judicial department in this district, all the judicial power necessary for the purposes

of government, would be vested in the courts of justice. *Kendall, Postmaster General v. The United States*, 12 Peters, 524. DURESS. (*Unlawful imprisonment.*) If a man execute a bond for fear of unlawful imprisonment, he may avoid it on the ground of duress. *Inhabitants of Whitefield v. Longfellow*, 1 Shepley, 146.

2. (*Same.*) Where a man is lawfully arrested, and offers to give such bond, as entitles him by law to be set at liberty, but the bond is refused, and the person detained under arrest through ignorance, and an obligation is given by him through fear of such unlawful imprisonment, it may be avoided. *Ib.*

3. (*Same.*) But if such person act freely and voluntarily, although under such unlawful detention, the obligation is valid. *Ib.*

ENGLAND. (*Laws of.*) The common and statute law of Great Britain, as it prevailed in the province of Georgia on the 10th of May, 1776, has been adopted in the state of Georgia. *Moss v. Wood*, Charlton, 42.

2. (*Decisions.*) And decisions of the English courts of justice made after that date, contravening decisions made prior to that period, are wholly inoperative in Georgia. *Ib.*

3. (*Criminal law.*) It seems, that the penal code of Georgia does not abrogate all the criminal law of England, in force anterior to its passage, but leaves it as it was, with a restriction only as to any punishment, which may be incompatible with the nature and purposes of a penitentiary system. *State v. Maloney*, Charlton, 84.

4. (*Modern decisions.*) Modern decisions of courts of England, subversive of the ancient common law or statutory principles adopted in Georgia, are of no authority in that state. *A. v. B.*, Charlton, 228.

ESTOPPEL. (*Consideration.*) The grantor is not estopped to prove, that there were other considerations, than that expressed in the deed. *Emmons v. Littlefield*, 1 Shepley, 233.

2. (*Title subsequently acquired.*) Where one conveys to another, by deed of general warranty, land to which he had not then a perfect title; any title subsequently acquired by the grantor will

enure by estoppel to the grantee. *Lawry v. Williams*, 1 Shepley, 282.

**EVIDENCE.** (*Performance of conditional acts.*) Where the charter of a bank required that certain acts should be performed, before it should be considered as incorporated—proof that its bills were received by the public officers of the state granting the charter, in payment of public debts, and that such bills were in general circulation in said state, held sufficient evidence on an indictment for counterfeiting its bills, that the conditions had been complied with, and that the bank was an “incorporated bank.” *State v. Calvin and another*, Charlton, 151.

2. (*Grantor.*) One who has given a deed of warranty to the defendant, and also a deed of quitclaim to the tenant, is a competent witness for the latter, on the question of title to the same land. *Wise v. Tripp*, 1 Shepley, 9.
3. (*County attorney.*) The county attorney cannot be admitted as a witness, to disclose the proceedings before the grand jury. *McLellan v. Richardson*, 1 Shepley, 82.
4. (*Particeps criminis.*) In a libel for divorce, the *particeps criminis*, if unmarried, is a competent witness. *Moulton, Lib. v. Moulton*, 1 Shepley, 110.
5. (*Promisor-principal.*) In a several action on a note by the payee against a surety, the principal is a competent witness; and his testimony is admissible to prove facts in relation to it happening after its execution. *Freeman's Bank v. Rollins*, 1 Shepley, 202.
6. (*Interested witness.*) The established rule is, that if a witness be discovered to be interested during any part of the trial, his testimony is to be disregarded, although there has been a previous unsuccessful attempt to exclude him by the party against whom he was called. *Butler v. Tufts*, 1 Shepley, 302.
7. (*Same.*) Where a party has attempted to exclude a witness, produced against him, by evidence of his interest from others, and has failed, the judge may in his discretion permit him to examine such witness on the *voir dire*; but it is doubtful whether this may be claimed, as matter of right. *Ib.*

8. (*Issuing of writ.*) It is competent to prove by parol evidence, that a writ, appearing by its date to have been issued on the Lord's day, was in fact made on a different day. *Trafton v. Rogers*, 1 Shepley, 315.
9. (*Private acts.*) By the statute 1821, ch. 59, § 33, the copies of private acts of the legislature, printed under the authority of the state, are to be received as evidence thereof in all courts of law. *Baring v. Harmon*, 1 Shepley, 361.
10. (*Admissibility of.*) When evidence has been offered on the trial and rejected, in determining the question submitted to the court, the truth of the facts offered to be proved is to be considered as established. *Galvin v. Thompson*, 1 Shepley, 367.
11. (*Agent.*) The declarations of an agent cannot be given in evidence against his principal, unless made in the actual discharge of the duties of his agency. *Gooch v. Bryant*, 1 Shepley, 386.
12. (*Alteration of a figure.*) The alteration of a figure in the date of a note, proved only by inspection of the note, is not of itself evidence, that the alteration was made after the signature and delivery. *Ib.*
13. (*Rebutting testimony.*) Evidence will be legal, as rebutting testimony, to repel an imputation or charge of fraud, which would not be admissible as original evidence. *Zacharie and Wife v. Franklin*, 12 Peters, 151.
14. (*Mistake of scrivener.*) Parol evidence is admissible to prove, that through the mistake of the scrivener, a clause intended by the parties to be in an agreement for the sale of land, was omitted. *Gower v. Sterner*, 2 Wharton, 75.
15. (*Drawer of note.*) The drawer of a promissory note is not a competent witness in an action by the holder against the indorser, to prove that the plaintiff was an original party to the drawing of the note, and agreed not to hold the defendant responsible for his indorsement. *Emerick v. Harley*, 2 Wharton, 50.
16. (*Indorser of note.*) The indorser of a promissory note is not a competent witness to prove the hand-writing of the drawer, in an action by the holder of the note against him; because

he would be entitled, if the plaintiff should recover, to an assignment of the judgment against the drawer, on paying the amount of the note, &c. *Geoghegan v. Reid*, 2 Wharton, 152.

**EXECUTION.** (*False return.*) Where an officer returned an execution in no part satisfied, and an action is brought upon the judgment on which the execution issued; the officer will not be permitted by his testimony to defeat such action, by showing his return to be false. *Wyer v. Andrews*, 1 Shepley, 168.

2. (*Satisfaction of, after return day.*) If an officer, after the return day of an execution in his hands, without authority from the creditor, receive the amount of such execution from the debtor, it is no satisfaction of the judgment. *Ib.*

3. (*Authority of officer.*) The testimony of officers and counselors, to show that an officer is generally considered, as having authority to receive the amount and discharge an execution remaining in his hands, after the return day, is inadmissible. *Ib.*

**EXECUTORS AND ADMINISTRATORS.** (*Waste of intestate.*) An administrator cannot be called to account, for the alleged waste of his intestate, committed on an estate, whereof he was executor, by bill brought by a legatee or a creditor of such wasted estate. The legal representative of such estate must bring the suit. *Welman v. Armour*, Charlton, 6.

2. (*Possession by heir or legatee.*) A general release or receipt, in full of all demands, will not extend to claims held by such releasor, as executor. *Wiggins v. Norton*, Charlton, 15.

3. (*Probate of will in another state.*) When the copy of a will and of the probate of it in another state, is duly filed in the proper probate office in this state, it has relation back to the time of the decease of the testator. *Hovey v. Deane*, 1 Shepley, 31.

**EXECUTOR DE SON TORT.** (*Vendee.*) It seems, that where possession of goods is taken by a vendee, after the death of vendor, under a deed fraudulent as to creditors, the vendee is liable to the creditors of deceased vendor, as executor *de son tort*. *Howland, Ward & Spring v. Dews*, Charlton, 383.

2. (*Same.*) And where the vendor remained in possession of the

goods after the execution of the deed, and the vendee took possession the day *before* the death of the vendor, and whilst he was *in extremis*, and the jury found, by their verdict, that such deed was fraudulent; held, that the vendee was chargeable to the *creditors* of deceased vendor, as *executor de son tort*. *Ib.*

**FEME COVERT.** (*Separate estate of.*) It is the settled law of Pennsylvania, that a married woman is to be deemed to possess no power in respect to her separate estate, but what is positively given, or reserved to her, by the instrument creating such estate. *Thomas v. Folwell*, 2 Wharton, 11.

**FOREIGN ATTACHMENT.** (*Authority of circuit courts.*)

Process of foreign attachment cannot be properly issued by the circuit courts of the United States, in cases where the defendant is domiciled abroad, or not found within the district in which the process issues, so that it cannot be served upon him. *Toland v. Sprague*, 12 Peters, 300.

2. (*Same.*) A party against whose property a foreign attachment has issued in a circuit court of the United States, although the circuit court had no right to issue such an attachment, having appeared to the suit, and pleaded to issue, cannot afterwards deny the jurisdiction of the court. The party had, as a personal privilege, a right to refuse to appear; but it was also competent to him to waive the objection. *Ib.*

3. (*Legacy.*) In Pennsylvania a legacy cannot be attached in the hands of an executor, for the debt of the legatee, by process of foreign attachment. *Shewell v. Keen*, 332. *S. P. Barnett v. Weaver*, 2 Wharton, 418.

**GRANTS OF LAND.** (*By a law.*) A grant may be made by a law, as well as a patent pursuant to a law; and a confirmation by a law is as fully to all intents and purposes a grant, as if it contained in terms a grant *de novo*. *Strother v. Lucas*. 12 Peters, 410.

**GUARANTY.** (*Offer and acceptance of.*) Where an offer of guaranty is made, accompanied with a request for an answer, in order to make it binding upon the individual offering, it is necessary that he be informed by the person to whom it is

offered, of his assent to such offer. *Valloton v. Gardner*, Charlton, 86.

2. (*Same.*) Where no such assent is signified, and the note of the individual for whose benefit the guaranty was offered, is taken by the creditor, after the debt or liability which formed the subject-matter of the offer, has been incurred, it is a complete waiver of the guaranty. *Ib.*

3. (*Obligation of notice.*) The rule is well settled, that the guarantor of a promissory note, whose name does not appear on the note, is bound without notice, where the maker of the note was insolvent at its maturity; unless he can show he has sustained some prejudice by want of notice of a demand on the maker of the note, and notice of non-payment. *Reynolds and another v. Douglass and another*, 12 Peters, 497.

**INSANITY.** (*Lucid interval.*) Where previous insanity is shown, the burthen of proof is thrown on the party, who seeks to establish an act as done in a lucid interval. *Griffin v. Griffin*, Charlton, 217.

2. (*Same.*) But proof that the act done, was in itself natural and rational, will control evidence of habitual insanity. *Ib.*

**INSURANCE.** (*Abandonment.*) By the well settled principles of law, in the United States, the state of the facts, and not the state of the information at the time of the abandonment, constitutes the criterion, by which it is to be ascertained whether a total loss has occurred or not, for which an abandonment can be made. If the abandonment when made is good, the rights of the parties are definitively fixed; and do not become changed by any subsequent events. If, on the other hand, the abandonment when made is not good, subsequent circumstances will not affect it; so as retroactively to impart to it a validity which it had not at its origin. *Bradlie v. The Maryland Insurance Company*, 12 Peters, 378.

2. (*Same—technical total loss.*) In cases where the abandonment is founded upon a supposed technical total loss, by a damage or injury exceeding one half the value of the vessel; although the fact of such damage or injury must exist at the

time, yet it is necessarily open to proof, to be derived from subsequent events. Thus, if the repairs, when subsequently made, clearly exceed the half value, it is plain that this affords one of the best proofs of the actual damage or injury. On the other hand, if the subsequent repairs are far below the half value, this, so far as it goes, affords an inference the other way. In many cases of stranding, the state of the vessel may be such, from the imminency of the peril, and the apparent cost of expenditures requisite to deliver her from it, as to justify an abandonment; although, by some fortunate occurrence, she may be delivered from her peril without an actual expenditure of one half of her value, after she is in safety. Where, in the circumstances in which the vessel then may have been, in the highest degree of probability, the expenditures to repair her would exceed half her value, and if her distress and peril be such as would induce a considerate owner, uninsured, and upon the spot, to withhold every attempt to get the vessel off, because of such apparently great expenditures; the abandonment would, doubtless, be good. *Ib.*

3. (*Same.*) In respect to the mode of ascertaining the value of the ship, and, of course, whether she is injured to the amount of half her value, it has, on the fullest consideration, been held by the supreme court, that the true basis of the valuation is the value of the ship at the time of the disaster; and that if after the damage is or might be repaired, the ship is not or would not be worth, at the place of repairs, double the cost of repairs, it is to be treated as a technical total loss. *Ib.*
4. (*Same.*) The valuation in the policy, or the value at the home port, or in the general market of other ports, constitutes no ingredient in ascertaining whether the injury by the disaster is more than one half of the value of the vessel, or not. For the like reason, the ordinary deduction in case of a partial loss, of "one third new for old," from the repairs, is equally inapplicable to cases of a technical total loss, by an injury exceeding one half of the value of the vessel. *Ib.*
5. (*Same—retardation of voyage.*) The mere retardation of the

voyage, by any of the perils insured against, not amounting to or producing a total incapacity of the ship eventually to perform the voyage, cannot, upon principles well established, be admitted to constitute a technical total loss, which will authorize an abandonment. A retardation for the purpose of repairing damage from the perils insured against, that damage not exceeding one moiety of the value of the ship, falls directly within this doctrine. Under such circumstances, if the ship can be repaired, and is repaired, and is thus capable of performing the voyage, there is no ground of abandonment founded upon the consideration that the voyage may not be worth pursuing, for the interest of the ship owner; or that the cargo has been injured so that it is not worth transporting further on the voyage: for the loss of the cargo for the voyage has nothing to do with the insurance upon the ship for the voyage. *Ib.*

6. (*Same—insurance on time.*) An insurance on time, differs as to this point, in no essential manner, from one upon a particular voyage; except in this, that in the latter case, the insurance is upon a specific voyage described in the policy; whereas a policy on time insures no specific voyage, but it covers any voyage or voyages whatsoever, undertaken within, and not exceeding, in point of duration, the limited period for which the insurance is made. But it does not contain an undertaking that any particular voyage shall be performed within a particular period. It warrants nothing as to any prolongation or retardation of the voyage; but only that the ship shall be capable of performing the voyage undertaken, notwithstanding any loss or injury which may accrue to her during the time for which she is insured; and of repairing it, if interrupted. *Ib.*

7. (*Proof of loss.*) In an action on a policy of insurance, referring to certain conditions, wherein it was stipulated, that the assured "shall procure a certificate under the hand of a magistrate, notary public, or clergyman, most contiguous to the place of the fire, and not concerned in the loss, or related to the insured or sufferers, that he is acquainted with the character and circumstances of the person or persons insured; and knows or

verily believes, that he, she, or they, really and by misfortune, and without fraud or evil practice, hath or have sustained by such fire loss and damage to the amount therein mentioned ; and until such certificate is produced, the loss shall not be deemed payable ; " after the destruction of the property insured by fire, the assured applied to the two nearest magistrates, who refused to give the required certificate, and then applied to the next nearest magistrate, who gave one, which was produced to the defendants : it was held, that the certificate of the nearest magistrate was a condition precedent to the right of the plaintiff to recover. *Leadbetter v. Etna Ins. Co.* 1 Shepley, 265.

**INTEREST.** (*On bond.*) Where a suit was instituted on a bond given for a certain sum of money, and conditioned for the performance of a duty, without any stipulation as to interest, and the jury, on an issue of fact submitted to them, found the bond declared on to be the deed of defendant, and assessed nominal damages : held, that interest could be awarded on such bond only in the shape of damages assessed by a jury. *The Governor v. Daniell*, Charlton, 449.

**JOINT DEBTORS.** (*Payment, &c. by one.*) In equity, the payment by, or the release and discharge of one joint debtor, will not operate as a discharge of the debt as to all, unless the intention of the parties and the justice of the case, require such a construction of the payment. *Norris v. Ham, et al.*, Charlton, 267.

**JURISDICTION.** (*Judiciary act of the United States.*) To give the supreme court of the United States jurisdiction, under the twenty-fifth section of the judiciary act, in a case brought from the highest court of a state, it must be apparent in the record, that the state court did decide in favor of the validity of a statute of the state, the constitutionality of which is brought into question on the writ of error. Two things must be apparent in the record ; first, that some one of the questions stated in the twenty-fifth section did arise in the state court ; and secondly, that a decision was actually made thereon, by the same court, in the manner required by the section. *M'Kinney v. Carroll*, 12 Peters, 66.

**JUSTICE'S COURTS.** (*Suits in.*) An entire contract cannot be divided, for the purpose of maintaining several suits, and bringing them within the jurisdiction of a magistrate. *Ex parte Gale, Charlton, 214.*

**JUSTICES OF THE PEACE.** (*Jurisdiction of.*) No presumption is to be made in favor of the jurisdiction of a justice of the peace. *Dodge v. Kellock, 1 Shepley, 136.*

**LAND.** (*Banks of rivers*) It seems, that the owners of land on the rivers Delaware and Schuylkill, have a right to the land between high and low water mark between their boundary lines; subject to the right of the public to pass over it in vessels, when covered with water. *Ball v. Slack, 2 Wharton, 508.*

**LANDLORD AND TENANT.** (*Use and occupation.*) In as-sumpsit for use and occupation, it is not necessary to render the defendant liable, that he should actually have held possession for the whole time laid in the declaration, if he became tenant by contract, and retained the control and command of the property under such contract. *Grant v. Gill, 2 Wharton, 42.*

2. (*Distress.*) A landlord may distrain for rent, which by the agreement of the parties is payable in advance. *Beyer v. Fenstermacher, 2 Wharton, 95.*

3. (*Necessary tools.*) The terms "necessary tools of a tradesman," in the law of Pennsylvania, which exempts certain articles from distress for rent, &c. are not to be restricted to those implements which are taken into the hands of the tradesman, but it seems, extend to all those articles, without which a man cannot work at his trade. *M'Dowell v. Shotwell, 2 Wharton, 26.*

4. (*Same.*) A weaver's loom is comprised within the "necessary tools of a tradesman," and as such, is exempt from distress, under the act of 10th April, 1828. *Ib.*

5. (*Lease.*) A written authority from one to another to give a lease to a third person, on terms previously offered in writing by such third person, is not in itself a lease. *Davis v. Thompson, 1 Shepley, 209.*

**LEGISLATIVE POWER.** (*To destroy offices.*) The legislature have power to destroy all offices (except those held by constitutional officers), which are made for civil government, and thus to put an end to the functions of the incumbents, before their term of office shall have expired. *State v. Mayor and Aldermen of Savannah*, Charlton, 250.

**LIMITATION OF ACTIONS.** (*Merchants' accounts.*) No principle of law is better settled, than, that to bring a case within the exception of merchandise accounts between merchant and merchant, in the statute of limitations, there must be an account ; and that, an account open or current ; that it must be a direct concern of trade ; that liquidated demands on bills and notes, which are only traced up to the trade or merchandise, are too remote to come within this description. But when the account is stated between the parties, or when any thing shall have been done by them, which by their implied admission is equivalent to a settlement ; it has then become an ascertained debt. Where there is a settled account, that becomes the cause of action, and not the original account ; although it grew out of an account between merchant and merchant, their factors or servants. *Toland v. Sprague*, 12 Peters, 300.

2. (*Same.*) The mere rendering an account does not make it a stated account ; but if the other party receives it, admits the correctness of the items, claims the balance, or offers to pay it, as it may be in his favor or against him ; then it becomes a stated account. It is not at all important, that the account was not made out between the plaintiff and the defendant : the plaintiff having received it, having made no complaint as to the items or the balance ; but, on the contrary, having claimed that balance, thereby adopted it, and by his own act treated it as a stated account. *Ib.*

3. (*In equity.*) Courts of equity are no more exempt from obedience to statutes of limitation, than courts of common law. *The Bank of the United States v. Daniels and another*, 12 Peters, 32.

**LIMITATIONS, STATUTE OF.** (*Several disabilities.*) If

several disabilities exist together at the time when the right of action accrues, the statute of limitations does not begin to run until the party has survived them all. *Butler v. Howe*, 1 Shepley, 397.

2. (Same.) But under the statute, a party cannot avail himself of a succession of disabilities, but only of such as existed, when the right of action first accrued. *Ib.*

3. (*Infancy and coverture.*) Where a feme sole infant, entitled to the possession of personal property, made a demand thereof, and afterwards during the infancy, became covert, and so continued until the suit was brought: it was held, that the cause of action accrued at the time when the demand was made; and that the action, having been commenced more than six years after she became twenty-one years of age, was barred by the statute of limitations. *Ib.*

4. (*Days of grace.*) Where a bill of exchange is entitled to grace, the statute of limitations does not commence running from the day it would have fallen due by its terms, but from the last day of grace. *Pickard v. Valentine*, 1 Shepley, 412.

**MORTGAGE. (Of personal property.)** Where personal property was mortgaged to ensure the delivery of articles on a given day; and the articles were not delivered at the stipulated time, but were afterwards delivered and accepted; the lien created by the mortgage is thereby discharged. *Butler v. Tufts*, 1 Shepley, 302.

2. (*Non performance of part of condition.*) A bond was made payable at a distant day, with lawful interest payable annually, to secure which, a mortgage was given with a proviso, that in default of payment of the principal sum, or the interest, at any time when the same should become due, it should be lawful to foreclose the same: held, that the mortgagee had the right, from the contract of the parties, to foreclose the mortgage, and collect the whole debt, principal and interest, on the failure of the mortgagor to pay the first year's interest when it became due. *Shellman and another v. Scott*, Charlton, 380.

**NOTICE. (Verbal.)** It seems that a verbal notice will not

affect a party, unless given to him in person. *Barnes v. Wright*, 2 Wharton, 193.

**PARTNERSHIP.** (*Fraud on dormant partner.*) To exonerate a dormant partner from liability to creditors, on the ground of a fraud practised upon him by the ostensible party, actual fraud must be proved by him. It is not sufficient for him to show that the other partner was largely indebted at the time of entering into the partnership, without also proving inquiry into the circumstances of the latter, and imposition practised upon himself. *Wood and another v. Connell*, 2 Wharton, 542.

2. (*Proof of assent.*) The assent of one of two partners, to a contract made by the other partner for the junction of the firm with a third person in another partnership, may be inferred from circumstances ; and such assent may be implied from the acts of one of the parties, the declarations of another, and the conduct of a third, taken together. *Ib.*

**PATENTS FOR LANDS.** (*Decease of patentee.*) A patent for lands, issued after the decease of the patentee, passes no title to the lands ; there must be a grantee before the grant can take effect. *Galloway v. Finley*, 12 Peters, 264.

**POOR.** (*Domicil.*) The residence of the wife is evidence of the domicil of the husband ; but it is not conclusive ; if he has abandoned her, or she has abandoned him, he may establish his domicil elsewhere. *Green v. Windham*, 1 Shepley, 225.

2. (*Same.*) Whoever removes into a town for the purpose of remaining there for an indefinite period, thereby establishes his domicil in that town. *Ib.*

3. (*Same.*) A change of domicil is not effected by an intention to remove, until that intention is carried out, by an actual removal. *Ib.*

4. (*Same.*) The domicil of a man depends upon the place where he does actually reside, and not upon the place where his legal or moral duties call upon him to reside. *Ib.*

5. (*Same.*) The wife has by law derivatively the settlement of her husband ; and this rule operates so long, as the marriage tie remains undissolved. *Ib.*

**POTOMAC RIVER.** (*Navigable stream.*) The Potomac river is a navigable stream, or part of the *jus publicum*; and any obstruction to its navigation would, upon the most established principles, be a public *nuisance*. *City of Georgetown v. The Alexandria Canal Co.*, 12 Peters, 91.

**PRESUMPTION.** (*Payment of bond.*) The inference of payment of a bond or other specialty, from lapse of time, is a presumption of law, and a subject of legal direction: the rebuttal of such presumption by circumstances is also a matter for the court; though the truth of the facts or otherwise is to be left to the jury. *Delany v. Robinson*, 2 Wharton, 503.

2. (*Occupation of land.*) Twenty-one years occupation of land, adverse to a right of way, and inconsistent with it, bars the right. *Yeakle v. Nace*, 2 Wharton, 123.

3. (*Enjoyment of way.*) Twenty-one years uninterrupted enjoyment of a right of way, affords presumptive evidence of a grant of the easement, whether the land over which the way passes be enclosed or unenclosed, cleared or woodland. *Worrall v. Rhoades*, 2 Wharton, 427.

**PURCHASER.** (*Of personal property mortgaged.*) If the mortgagee of personal property fail to record his mortgage, a *bona fide* purchaser claiming under the mortgagor, without notice, will be entitled to retain the property. *Cumming v. Early, Charlton*, 140.

2. (*Same.*) A purchaser for valuable consideration, without notice actual or constructive, will be protected, though he purchase from one who had notice. *Ib.*

**SEISIN AND DISSEISIN.** (*Execution creditor.*) Where an execution creditor levies upon land, of which the debtor is in possession, he thereby acquires a *seisin*, although defeasible, if the land belong to another. *Bartlett v. Perkins*, 1 Shepley, 87.

2. (*Adverse claim.*) Building upon, or enclosing, the land of another, without right, is constructive notice to the owner of an adverse claim to it. *Alden v. Gilmore*, 1 Shepley, 178.

3. (*Same.*) But if one enter upon another's land by his consent,

or as his tenant ; the owner is not disseised, but at his election until he has had notice, that the occupancy is adverse, or there has been some change in the nature of such occupancy calculated to put him on his guard. *Ib.*

4. (*Same.*) Declarations to a stranger to the title by the lessee, that he holds adversely to the owner, is not evidence of a disseisin. *Ib.*

**SHIPPING.** (*General average—jettison.*) Goods shipped on deck and lost by jettison are not entitled to the benefit of general average. *Cram v. Aiken*, 1 Shepley, 229.

2. (*Same—usage.*) Where goods are transported by water from place to place, an usage at such places to carry a certain description of goods on deck, after the hold is full, does not render the owner of a vessel liable to contribution for the jettison of such goods, when laden on deck. *Ib.*

3. (*Same.*) And where, by the usage of the place, such goods pay the same freight, when carried on deck as if carried in the hold ; they are not entitled to the benefit of general average, when paying full freight, if they are laden on deck and lost by jettison. *Ib.*

4. (*Contribution.*) In an action between the owner of goods shipped on board a vessel on freight, and the master of the vessel, an adjustment and general average of a loss, made on the protest and representation of the master, does not preclude the owner from showing, that they are not liable to contribution because the loss was occasioned by the culpable negligence or want of skill of the master. *Chamberlain v. Reed*, 1 Shepley, 357.

5. (*Same—lien.*) The master has a lien on goods shipped on freight, liable to contribution, on an adjustment of general average. *Ib.*

**SLANDER.** (*Size, &c. of plaintiff.*) In an action of slander, evidence of the size and strength of the defendant is not admissible. *Beehler v. Steever*, 2 Wharton, 313.

2. (*Number of plaintiff's children.*) In such action, evidence may be given of the number of the plaintiff's children, and the state of his family. *Ib.*

3. (*Mitigation of damages.*) Any defence, which does not amount to a justification, may be given in evidence, in mitigation of damages, in an action of slander. *Ib.*

STATUTES. (*Cumulative.*) If a statute give merely a new remedy, where one before existed at common law, it is cumulative; and the party injured is at liberty to pursue either. *Gooch v. Stevenson*, 1 Shepley, 371.

2. (*Affirmative.*) If a statute give the same remedy, which the common law does, it is merely affirmative, and the party has his election which to pursue. *Ib.*

3. (*Excluding.*) But if a statute deny or withhold the remedy, which before existed at common law, the common law right ceases to exist. *Ib.*

4. (*Introductory of new rule.*) In general, a statute which introduces a new rule of law, and directs a particular method of proceeding under it, will, although it has no negative words, debar any other mode. *Guerard & Polhill v. Polhill*, Charlton, 237.

STATUTE LAW. (*English—introduction of.*) It was not an uncommon course of legislation in the states, at an early day, to adopt, by reference, British statutes; and this has been the course by legislation in congress, in many instances, when state practice and state process has been adopted. And such adoption has always been considered as referring to the law existing at the time of adoption, and no subsequent legislation has ever been supposed to affect it; and such must, necessarily, be the effect and operation of such adoption. *Kendall, Postmaster General v. The United States*, 12 Peters, 524.

SURETY. (*Substitution.*) A surety, who pays the debt, is entitled to be substituted in the place of the creditor, as to all the security or means possessed by him, against the principal debtor, and all the co-sureties. *Norris v. Ham and another*, Charlton, 267.

TENANTS IN COMMON. (*Privilege in dwelling-house.*) A privilege reserved in a dwelling-house to a person, for a limited time and for a special purpose, does not constitute him a tenant in common of the estate. *Abbott v. Wood*, 1 Shepley, 115.

2. (*Action by one.*) One tenant in common of a personal chattel may maintain an action against his co-tenant, by whom such chattel was received as a common carrier, and by whose negligence and carelessness it was destroyed. *Herrin v. Eaton*, 1 Shepley, 193.
3. (*Ouster by one.*) One tenant in common may oust his co-tenant, by resisting or denying his right or by excluding him from the enjoyment of it; and an interest thus acquired may become indefeasible by an uninterrupted continuance for a sufficient time. *Thomas v. Pickering*, 1 Shepley, 337.
4. (*Deed of warranty by one.*) A deed of warranty given by one tenant in common in possession to a stranger who records his deed and enters and occupies a part thereof, the residue remaining vacant, ousts the co-tenants of the grantor, and puts the grantee in the seisin of the whole; and he becomes entitled to the protection of the statute of limitations against all conflicting rights. *Ib.*

**TOLLS.** (*Prerequisite to demand of.*) If the act granting the right to erect a toll bridge require, that the rates of toll shall constantly be kept exposed to the view of passengers at the place where the tolls are collected; no action can be maintained for the recovery of the penalty given for forcibly passing the bridge without paying toll, unless the corporation have complied with this requirement. *Middle Bridge v. Brooks*, 1 Shepley, 391.

2. (*Same.*) Where there has once been a compliance with this provision on the part of the corporation, and the board on which the rates of toll were established was afterwards unlawfully destroyed, such action cannot be maintained, unless the rates of toll are again exposed to view, as soon as may be. *Ib.*

**TRESPASS.** (*Cutting grass.*) An action of trespass *quare clausum*, for cutting grass, can be maintained only by the tenant in possession. *Bartlett v. Perkins*, 1 Shepley, 87.

2. (*Entry of dwelling-house.*) Where a person has lawful authority to enter the dwelling-house of another for one purpose; if he enter forcibly for a different one, for which he has no authority, he thereby becomes a trespasser. *Abbott v. Wood*, 1 Shepley, 115.

3. (*Timber trees.*) The owner of timber trees, standing on land of another, may maintain trespass against any person for cutting and carrying them away. *Howard v. Lincoln*, 1 Shepley, 122.
4. (*Against officer.*) An action of trespass does not lie against an officer for arresting a person, in obedience to his precept, who happens to be then privileged from arrest, as a witness attending court. *Carle v. Delesdernier*, 1 Shepley, 363.

**TRUSTEE.** (*Becoming purchaser.*) When a trustee becomes the purchaser of the trust estate, the *cestui que trust* may set aside the purchase. *Campbell v. The Penn. Life Ins. Co.* 2 Wharton, 53.

2. (*Same—judicial officers.*) The principle extends not only to a trustee, properly so called, but to judicial officers and all other persons who in any respect have a concern in the disposition and sale of the property of others; and it is immaterial whether the sale is public or private, judicial or otherwise, or for a *bona fide* price. *Ib.*

**TRUSTEE PROCESS.** (*Assignment of ship at sea.*) One to whom a vessel had been assigned in trust for the benefit of creditors, which was absent at sea at the time the assignment was executed and which did not return until after the service of the trustee process, was held chargeable, as trustee, for the balance of the proceeds of the sale of the vessel, after paying such creditors as had executed the assignment previously to the service. *Arnold v. Elwell & Tr.* 1 Shepley, 261.

2. (*Several defendants.*) Where the person, summoned as trustee in a foreign attachment, discloses that he is indebted on account to one of several defendants, he is chargeable as trustee. *Thompson v. Taylor & Trs.* 1 Shepley, 420.
3. (*Uncompleted sale.*) Where one had contracted to sell part of a vessel, had received a portion of the purchase money, and was ready to give a bill of sale thereof on being paid the balance, but retained the possession; he was held chargeable, as trustee, under the stat. of 1835, ch. 188. *Witherell v. Miliken & Trus.* 1 Shepley, 428

**VENDORS AND PURCHASERS. (Stoppage in transitu.)**

Where goods are sold on credit at a foreign port and shipped on board a vessel of the vendee, consigned to him, and to be delivered to him at his port of residence ; and the consignee becomes insolvent before payment is made ; the vendor has the right to stop the goods in their transit at any time before they shall come into the actual possession of the vendee. *Newhall and another, Adm'rs. v. Vargas*, 1 Shepley, 93.

2. (*Same.*) The right to stop the goods *in transitu* is not divested by the purchase of the goods of others by the vendor on his own credit for the vendee. *Ib.*
3. (*Same.*) Nor by the vendor's taking bills of exchange drawn in his favor by the master of the vessel on the vendee. *Ib.*
4. (*Same.*) Nor by charging a commission for doing the business. *Ib.*
5. (*Same.*) Nor does the reception by the vendee of part payment take away the right. *Ib.*
6. (*Same.*) A claim made by the vendor on any person having charge of the goods, before the transit ends, is a sufficient exercise of the right of stoppage to revest the goods. *Ib.*
7. (*Same.*) To prevent the enforcement of this right, it is not sufficient for the consignee to make his claim to the goods ; he must obtain the actual possession. *Ib.*
8. (*Same.*) To entitle himself to exercise his right of stoppage, the vendor is under no obligation to refund what he may have received in part payment ; nor to pay the value of the freight. *Ib.*
9. (*Trees standing.*) A sale of a certain description of standing timber trees, to be taken off within a specified time is a sale only of so many of the trees specified, as the vendee may take off within the time limited. *Howard v. Lincoln*, 1 Shepley, 122.
10. (*Grass grown.*) Grass already grown, and in a condition to cut, may be sold by parol ; and there is no objection to such sale, arising from the statute of frauds. *Cutler v. Pope*, 1 Shepley, 377.

**WAY. (Entry upon adjoining land.)** When persons employed

in constructing a new highway necessarily enter upon the adjoining land, doing as little damage as may be ; they do not thereby render themselves liable to an action of trespass. *Cool v. Crommett*, 1 Shepley, 250.

2. (*Rights of owner of land under.*) The owner of land appropriated for a highway, retains the freehold in the soil, and, subject to the easement, and not interfering with it, may use the land in any manner, and may maintain ejectment, trespass or waste, for any exclusive appropriation of it by another. *Mayor and Aldermen of Savannah v. President, &c. of Steam Boat Co.*, Charlton, 342.

3. (*Same.*) And the statute of Georgia, which directs compensation to be made to the owners of land laid out for a highway, must be taken to provide for the purchase of the easement, and not of the land. *Ib.*

4. (*Freehold in.*) As a general rule, the freehold in the highway must be taken to belong to the proprietors of the adjoining soil. *Ib.*

5. (*Same.*) But this rule being founded on the presumption, that such way was originally taken out of the lands of the party who hath other lands adjoining, is not applicable, when such presumption cannot arise from the facts shown. *Ib.*

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### III.—MISCELLANEOUS CASES.

*In the Municipal Court of the City of Boston, April Term, 1838.*  
**THE COMMONWEALTH AGAINST JOSIAH DUNHAM, EBENEZER STEVENS, SAMUEL S. RIDGWAY, THOMAS H. DUNHAM, AND EBENEZER HAYWARD, DIRECTORS OF THE FRANKLIN BANK.**  
**THE COMMONWEALTH AGAINST ISAAC O. BARNES, SERIAH STEVENS, AMASA G. SMITH, OTIS DRURY, MARCELLUS BOWEN, AND GEORGE PAGE, DIRECTORS OF THE LAFAYETTE BANK.**

The Revised Statutes of Massachusetts, ch. 36, sect. 65, enact that the cashier of each bank, in every year, shall make a return on oath of the state of such bank to the secretary of the commonwealth, on the requisition of the

governor; and that a majority of the directors shall certify on oath, that the books of the bank indicate the state of facts so returned by the cashier, and that they have full confidence in the truth of said return:—an indictment against directors of a bank for making such certificate on oath, without having first examined and compared the return with the books, and without knowing whether the return was true or false, was holden not to describe a misdemeanor at common law, notwithstanding the return was false, because it was not alleged to have been done wilfully, or with an evil or unlawful intent.

If such certificate was made and sworn to by the directors wilfully; it was perjury under the revised statutes, ch. 128, sect. 2.

Several persons may be jointly indicted and tried together for offences arising wholly out of the same joint act or omission: or they may be tried separately, at the discretion of the court, if that is deemed necessary for a fair trial.

To wilfully do an act which is prohibited, or to designedly omit the performance of one which is required by statute, in a matter which concerns the public, is punishable at common law, where no specific penalty is otherwise enjoined.

THESE indictments were returned by the grand jury at the last February term. The defendants were brought into court on a warrant, and required to plead at the same term. They severally pleaded not guilty; and the indictments were, on their motion, continued to the next term. Owing to a clerical mistake in the indictment against Isaac O. Barnes and his associates, a second was returned against them, at the same term, for the same cause of complaint. At the March term, Marcellus Bowen, one of the defendants, pleaded in abatement the pendency of the first indictment against him. The attorney for the commonwealth, afteroyer of the former indictment, demurred specially to this plea, and assigned the mistake in that, as the cause for returning the second. The demurrer was joined, and the counsel were heard on this plea, as well as on one similar, which had been filed to an indictment returned against Josiah Dunham, jr. for wilful purjury, in which case there was a like error, and a second indictment returned for the same cause. The plea in abatement was overruled, and the defendants adjudged to answer further. They thereupon severally pleaded not guilty.

The first indictment against Marcellus Bowen, Isaac O. Barnes, and their associates, was then dismissed on the motion of the commonwealth's attorney.

A motion was made at the same term, by the defendants, in these several indictments, for a continuance, and affidavits filed by them, declaring that they believed that such excitement existed against them in the public mind, as would preclude them from having a fair trial at that time. After hearing the counsel on this motion, the court ordered a second continuance, and appointed the trial of Josiah Dunham, jr. the cashier, for 12th of April, and that of these directors for the sixteenth of that month.

At the April term (7th) the defendants moved the court, that both these indictments be quashed, "because the matters and things therein set forth and alleged, describe no offence which is such at common law, or by any statute of this commonwealth: and that if there be any offence set forth, it is not one for which the defendants are liable to be indicted jointly, but severally only, and that a joint indictment cannot be maintained therefor."

On Monday, 16th April, Messrs. *Edward Crust, jr.* and *B. F. Hallett* were heard in support of this motion. On Thursday, the 19th, Mr. *Parker*, the commonwealth's attorney, argued against the motion, and in support of the indictments. Mr. *Sprague* replied to him on the same day; and on Saturday, the 21st, the argument for the motion was closed by *Bradford Sumner*, Esq. These arguments were full of learning and research, and extended to great length. The points principally relied on will be collected from the following opinion of the court, which was pronounced on Thursday, the 26th of April, by the

Hon. P. O. THACHER. If the indictments describe with sufficient certainty any offence, either at the common law, or against any statute of this commonwealth, and there is no misjoinder of the parties; the motion to quash must be denied. Although in cases which are novel and interesting, such a motion is rarely made, and still more rarely sustained; yet the court must now decide according to its judicial conscience. The learned counsel on both sides have, from their extensive research into the principles of law, and by their protracted arguments, imposed on the court a serious responsibility, from which it would have gladly been relieved. Nothing has been omitted to enlighten the court,

and there is no escape with honor from the duty of deciding on the sufficiency of these indictments.

The indictments have been drawn with much legal caution, and contain a recital of the various provisions in the statutes on which they are framed. In that against Josiah Dunham and his associates, they, being a majority of the directors of the Franklin bank, are indicted for certifying, on oath, that the books of that bank indicated the correctness of the statement of the condition of the bank, on the first Saturday of September, 1836, at two o'clock of the afternoon of that day, made by Benjamin F. Hathorne, the cashier, and that they have full confidence in its truth :—which certificate was made pursuant to the 65th section of the 36th chapter of the revised statutes. The allegations in the indictment charge, that the defendants did not examine the books of the bank, nor compare them with the return, which as public officers they were bound and obliged to do, that they might ascertain, judge, and determine, whether the books indicated the correctness of the return, and whether they could truly certify, after such examination, that they had full confidence in its truth ;—but without examining the books, and without knowing what they indicated, that they made and signed the certificate, and swore to it before Hugh Montgomery, Esq., a justice of the peace. The indictment then avers, that it was not a true return, but false ; that the books of the bank did not indicate the state of facts so returned, but, on the contrary, they indicated a different state of facts ; that the debts of the bank were larger than was therein set forth, and that the resources were of less value ; and that the return was, in all the particulars, excepting as to the amount of the capital stock, inaccurate and false, was calculated to deceive, and did deceive the secretary of the commonwealth, the cashiers of all the other banks, and all the citizens of this commonwealth. Hence the indictment concludes, that the defendants committed an official misdemeanor and criminal neglect of duty in their office of directors of the bank in the premises, against the peace and dignity of the commonwealth, and contrary to the form and effect of the statute, in such case made and provided.

The indictment against Isaac O. Barnes, and his associates, accuses them of a like official misdemeanor and criminal neglect of duty in their office of directors of the Lafayette bank, they being a majority of the directors of the same, for certifying on oath to a like false return of the state and condition of that bank, on the same first Saturday of September, 1836, at two o'clock in the afternoon of that day, made by one Josiah Dunham, jr., the cashier, with like allegations and averments.

It appears from the record, that the defendants in both cases, are jointly indicted for disobedience or neglect of a duty, which was required of them by law, in their capacity of directors of a bank. The rule is well established, that several may be jointly indicted and tried for offences arising wholly out of the same joint act or omission. 1 Starkie's Criminal Pleading, 33. It is usual to include in one indictment, several persons, charged with a criminal act, done at one and the same time, and in which they all took part. Although the act done is the separate act of each, and in that respect is several in its nature; yet the fault, if there is any, is common to all. No confusion need arise from a joint trial. One law required the act to be done by all these defendants; the same evidence will probably establish the fact against each; and the same general defence will apply to all, with perhaps some shades of difference:—as in the case of Mr. Page, one of the defendants, who, it is said by his counsel, signed the false certificate, but did not make oath to it. Where several persons are concerned together in the perpetration of the same felony or misdemeanor, of whatever magnitude, they are usually included in one and the same indictment, and may be put on trial together. While the accusation is pending, no one named in the indictment, unless after conviction and before sentence, or after a verdict of acquittal, is a lawful witness for his associates; as it might be a temptation to the commission of perjury. But it is not necessary, in a case like the present, that all concerned should be joined in the same indictment, and tried together. They may be joined in the same indictment, and not tried together. They may be indicted and tried separately:—and it is always in the discretion of the

court to order a separate trial, where it is necessary to the justice of the case, and to secure to the party accused a fair trial.<sup>1</sup>

There has been, in the course of the argument, much discussion as to what constitutes a public officer, and whether directors of banks are such. Undoubtedly there is a great distinction between officers for whose appointment the constitution provides, and such as owe their origin to acts of the legislature. Whether created by one or the other, they are legal officers, although their duties may greatly vary in dignity and importance. It seems to be well settled, that any public officer is indictable for misbehavior in office. But the officers appointed by a private charter of incorporation, are no otherwise public officers, than as they may have duties to be performed to the public. I am of opinion, that when the law requires an act to be done, it implies the power as well as the right of performance by him from whom it is required, and makes it his duty. Where such duty is imposed on the officers of a corporation, as an official act, and for a public purpose, they are thereby constituted officers for that purpose, and wilful disobedience on their part would be a misdemeanor. If the law has required the defendants in their character and office of directors of a bank to perform a certain duty, it was incumbent on them to execute the task according to the true meaning and intent of the law. We need not, therefore, I think, trouble ourselves to settle the question, whether they are, or are not public officers, within the meaning and intent of the constitution. That would be matter of curiosity rather than essential to the right view of this case. The only question which remains to be considered, therefore, is, whether the indictment against these defendants describes any offence known in law. For all the purposes of this argument, the facts set forth in the indictment must be deemed to be true.

<sup>1</sup> Where several join in a riot, or a conspiracy for any unlawful purpose, or to commit a trespass, or a nuisance, or to keep a gaming house, or for the omission or misfeasance of a joint duty, and are indicted together; they all may be put on trial at once. To allow separate trials under such circumstances, is not necessary for the safety of the individuals; is unwarranted by practice; and would be extremely onerous, if not, in most cases nearly impracticable.

It has been for some years the policy of the legislature of this commonwealth, to grant charters to banks, for the promotion of industry and manufactures, to stimulate enterprise in all departments of business, and to make the whole capital of the state active in developing its resources for wealth and improvement. So numerous have been the applications for banks, notwithstanding they were burdened with a heavy tax,<sup>1</sup> that nearly a sufficient amount of revenue has, for some years past, been derived from this source alone, to defray the expenses of the government. Perhaps, charters have, in some instances, been granted improvidently, without sufficiently consulting the wants of the community, or the ability of petitioners to advance the requisite capital. Many banks have been granted to *borrowers*, rather than to *lenders*; and the country has been filled with an unsound currency.<sup>2</sup> For some time, the idea prevailed, that the banks could best regulate themselves, and be sufficient checks on each other. But experience proved the danger to be apprehended from the mismanagement of banks, and from the lack of intelligence and fidelity in their officers; and called for laws to restrain excessive loans, and to prevent banks from issuing more bills than they could redeem in specie. With this view, an annual return was required to be made by the several banks, to ascertain their ability to meet their engagements, and that it might appear, whether their business was managed according to the correct rules of banking, and the requirements of law. By the 65th section of the 36th chapter of the revised statutes, it is made the duty of the cashier of every bank, "upon the requisition of the governor, to make a return of the

<sup>1</sup> The first act which imposed "a tax on the banks within this commonwealth," was that of 1812, chapter 32.

<sup>2</sup> "What are banks? They are mere organized agencies for the loan of money, and the transaction of monetary business; regulated agencies, acting under the prescriptions of law, and subject to a responsibility, moral and legal, far transcending that under which any private capitalist operates. A number of persons, not choosing to lend out their money privately, associate together, bring their respective capitals into a common stock, which is controlled and managed by the corporate government of a bank." From the speech of Henry Clay in the Senate of the U. S., Feb. 19, 1838.

state of such bank, as it existed at two o'clock in the afternoon of the first Saturday in such preceding month as the governor may direct ; and he shall transmit the same, as soon as may be, not exceeding fifteen days thereafter, to the secretary of the commonwealth ; which return shall specify the amount due from the bank, designating, in distinct columns, the several particulars included therein, and shall also specify the resources of the bank, designating, in distinct columns, the several particulars included therein," according to an appointed form : " which return shall be signed and sworn to by the cashier of such bank, who shall make oath before some justice of the peace, to the truth of said return, according to his best knowledge and belief ; and a majority of the directors of each bank shall certify and make oath, that the books of the bank indicate the state of facts so returned by the cashier, and that they have full confidence in the truth of said return ; and no further return shall be required from said banks." It must appear from these returns which of the banks are able to pay their debts. The security of a bank consists in the certain knowledge of the sufficiency of its fund, or stock, the solidity of its institution, and the incorruptible fidelity of its management. It is always for the interest of a bank to give to the public the utmost satisfaction ; and it is undoubtedly the right and duty of the government who have granted the charter, to supervise its management.

The attorney for the commonwealth has contended in his argument, that the offence described in the indictment is an offence at common law, because it is an official misdemeanor and criminal neglect of duty. But banks were not known at the common law, nor were the cashiers and directors of banks in this commonwealth ever required to make and certify on oath a return of the condition of their banks until the year 1828, when a law was made for that purpose. The indictment alleges, that the act complained of was done "against the peace and dignity of the commonwealth, and contrary to the form and effect of the statute in such case made and provided," which is the usual conclusion of an indictment which is founded on a statute, but will avail too at common law.

It is contended, that the offence described in the indictment is a

misdemeanor at common law, because it is an act prohibited by statute, but for which the legislature has not declared a penalty. The authorities fully sustain the principle, that to do an act wilfully which is prohibited, or to wilfully omit the performance of one which is required to be done by a statute, in a matter which concerns the public, is punishable as a misdemeanor at common law, where no specific penalty is otherwise enjoined. Before the statute required a return to be made upon the requisition of the governor, there was no obligation at the common law to make one. But when the statute required such return to be made, it became a duty, and wilful disobedience would constitute an offence. The offence grows out of the statute. If that imposes a penalty, such penalty is the sole forfeiture. But if the statute imposes no penalty, then, according to the general principles of law, as known and practised in this commonwealth, derived from the common law of England, and brought to this country by our ancestors, it is to be punished as a misdemeanor at common law.

Disobedience and punishment are essential ingredients in a law, which regulates human conduct. If there were no punishment for disobedience, there would be no law. When we speak of an offence at common law, we mean one that is defined by that law, and not created by statute. Some common law offences have been made the subject of statute regulation; in which case, the statute provision is cumulative in its nature, unless it has expressly repealed the common law offence. But the common law is the very element of all our laws, whether contained in the constitution, or in statutes of the legislature. When a doubt exists relative to either, the common law assists our construction, and it is always safe. The judge who does not breathe the common law on the bench, is like a pilot without rudder, compass, or chart, and shipwrecked on the ocean. They who declaim against the common law, are ignorant of its profound wisdom, its humanity, its tender solicitude for the whole and every individual who compose the body politic. Let him who would grow wise go to its fountains, and drink deep from them. They are as old as society, have increased with its wants, and are the effect of its wisdom.

“ When a statute commands or prohibits a thing of public concern, the person guilty of disobedience to the statute, besides being answerable in an action to the party injured, is likewise liable to be indicted for the disobedience.” Bac. Abr. tit. statute (x); Viner’s Abr. art. statutes, E. 6; 1 Hawk. ch. 22, s. 5.

In Crouther’s case, 41st of Elizabeth, the king’s bench held, “ that in every case where a statute prohibits any thing, and doth not limit a penalty, the party offending therein may be indicted, as for a contempt against the statute.” Cro. Eliz. 654.

By the statute of Westminster primer, (3 E. 1) it is declared, that the sheriff from henceforth shall not lodge with any person, with any more than five or six horses; and that they shall not grieve religious men, nor others, by often coming and lodging, neither at their houses nor their manors.

On this lord Coke remarks, 2 Inst. 163, “ and that we may note once againe for all, whensoever an act of parliament doth generally prohibit any thing, as in this chapter it doth, the party grieved shall not have his action onely for his private relieve, but the offender shall be punished at the king’s suit for the contempt of his law.”

In Crofton’s case, 1 Mod. 34, Twisden, justice, said, and I think with more truth and caution, “ whenever a thing is prohibited by a statute, if it be a public concern, an indictment lies upon it.”

The principles of the law on this subject were stated very clearly by lord Mansfield in *Rex v. Robinson*, 2 Burr. 799. In pronouncing the opinion of the court, he said, “ where a statute *creates* a new offence, by prohibiting and making unlawful any thing which was lawful before; and appoints a specific remedy against such new offence (not antecedently unlawful) by a particular sanction and method of proceeding, that particular method must be pursued and no other. Castle’s case, Cro. Jac. 643. But where the offence was antecedently punishable by a common law proceeding, and a statute prescribes a particular remedy by a summary proceeding; there, either method may be pursued, and the prosecutor is at liberty to proceed either at common law, or in the method prescribed by the statute; because there the sanction is cumulative, and does not exclude the common law punishment. *Stephens v. Watson*, 1 Salk. 45.

After a very learned argument, he concludes, “ the true rule of distinction seems to be, that where the offence intended to be guarded against by a statute, was punishable before the making of such statute prescribing a particular method of punishing it, there such particular remedy is cumulative, and does not take away the former remedy : but where the statute only enacts that the doing any act not punishable before, shall for the future be punishable in such and such a particular manner, there it is necessary that such particular method, by such act prescribed, must be specifically pursued, and not the common law method of an indictment.”

The judgment in *Rex v. Robinson* was pronounced in 1759. But the principles of law in that case were recognised by the court of king’s bench in 1791, in *The King v. James Harris*, 4 Term R. 202.

By the act of 26 Geo. 2, c. 6, sect. 1, it was enacted, that all persons going on board ships coming from infected places, shall obey such orders as king the in council shall make, without annexing any particular punishment. And it was held by lord Kenyon, the chief justice, and the other justices, Ashurst, Buller, and Grose, that the disobedience of such an order was an indictable offence, and punishable as a misdemeanor at common law.

It was argued, that the judgment of the court was discretionary, as in the cases of a misdemeanor at common law. When an act of parliament creates a new offence, and in the same clause gives a specific punishment, the court have no discretion, but must inflict that punishment ; but when no offence is created by a separate substantive clause, the court may give a general judgment for that offence, as in the case of a misdemeanor, notwithstanding there be another section in the same statute, giving a specific punishment. Now this case falls within the latter description : for it commands persons going on board particular ships to obey such order as the king in council shall make, without directing any particular punishment for the disobedience of that order. Then it follows, that the disobeying such order is a misdemeanor, for which the court may give a general judgment of fine, or imprisonment, or both.

Lord Kenyon said, that disobedience of an order thus made by the king in council, pursuant to an act of parliament, was unquestionably an offence at common law. He quoted with approbation the decision of the court in *Rex v. Robinson*.

The case of *Rex v. Balme et al.* Cowp. 640, was against the defendants, who were surveyors of the highway, for disobedience to an order of justices made pursuant to stat. 13, Geo. 3, c. 78, "for the amendment and preservation of the public highways." The indictment charged that the justices made such order, and that the defendants "*wilfully and contemptuously neglected and refused to obey it.*" Aston, justice, said, "As to the mode of prosecution, there is no doubt but the justices may proceed summarily under the act, if they think proper: but they may elect to prosecute at common law; for disobedience to an order of justices is an offence at common law."

The punishment for offences at common law in this commonwealth, as well as in England, is by a fine and imprisonment, both or either, regulated by the sound discretion of the court, according to the magnitude of the offence. New and unusual modes of punishment are against the genius of our laws. Where the malignant wit of man devises a new method of offending, and the safe and simple punishment of the common law is found to be inadequate, the legislature must interpose; as by the act of 1812, ch. 134, which enacted, that "for any crime or misdemeanor, which was then by law punishable by whipping, standing in the pillory, sitting on the gallows, or *imprisonment in the common jail of the county*, the court might, at their discretion, in cases not already provided for, in lieu of the punishments aforesaid, order and sentence such convict or convicts to suffer solitary imprisonment for a term not exceeding three months, and to be confined to hard labor for a term not exceeding five years, according to the *aggravation of the offence.*" Under this act, persons have been sentenced for aggravated assaults, riots, and libels, which are misdemeanors at common law, to suffer the punishment of hard labor, which is better adapted in many cases, to subdue the stubborn dispositions of bad men, and to compel them to apply to whole-

some occupation. The Revised Statutes, chapter 139, s. 1, sanction the usage of the courts in many cases, by declaring that "in any case of legal conviction, where no punishment is provided by statute, the court shall award such sentence, as is conformable to the common usage and practice in this state, according to the nature of the offence, and not repugnant to the constitution." From the reason of the thing, and the authority of former decisions, it is I think, evident, that the idea, that for the supreme power in the state to command a thing to be done or omitted, without the power to enforce obedience, would be nugatory and absurd; inasmuch as the right to punish disobedience is consequent on the right to command, and as punishment ought invariably to follow disobedience.

The learned attorney for the commonwealth has very ably shown, both by argument and authority, that if the defendants wilfully signed and swore to the certificate in this case, it was a misdemeanor. In the fifth position of his argument, which was published in the Daily Centinel and Gazette of April 21st, he asserts "that every wilful misfeasance in a public officer injurious to the public, every wilful neglect or intentional omission of a positive, important duty specially and peremptorily commanded by a statute, is an indictable misdemeanor at common law." His sixth position is, "that the wilfully signing a false certificate, as alleged in these indictments, that the books of a bank indicate the state of facts certified by the cashier, and swearing to the truth of that certificate, so much concerning and so injurious to the public, and its currency and transactions, without ever looking at the books, and without knowing they are certifying to and swearing to a truth or a falsehood, is a disobedience and violation of the positive requirements of the statute, and a voluntary dereliction of express duty, and in a public officer, viz. in a bank director, a wilful misfeasance, a wilful neglect and intentional omission of duty, and therefore indictable, if in fact the certificate be false."

The authorities relied upon in support of these indictments clearly prove, that if the misconduct or disobedience complained of was done wilfully or corruptly, it is an indictable offence.

The case of *Rex v. Martin*, 2 Camp. 268, before lord Ellenborough, was against an overseer of the poor for *fraudulently* omitting to give credit to the parish for a sum of money which he received from the putative father of a bastard child, as a composition with the parish for the maintenance of the child. It was held good.

The case of the *People v. Denton*, 2 Johnson's Cases, 275, has been much relied on for the opinion of Kent, justice, which is found in a note. That was an indictment against Denton for a misdemeanor in neglecting his duty as an inspector of an election, and was founded on the election law of the state of New York, which declared, "that if an inspector shall wilfully neglect to perform his duty, or be guilty of any corrupt misbehavior, and be thereof convicted, he shall forfeit and pay two hundred pounds. Kent says, in his opinion, "that every wilful neglect of a public trust, affecting the community, is an offence at common law."

The attorney has referred, in his argument, to the case of the *Commonwealth v. the Mayor and Aldermen of the city of Boston*, which was tried at the May term of this court, 1833. They were indicted for neglecting to perform the duty of making out a true certificate of the result of an election which was held in the city of Boston, in April preceding, for a representative to congress for this district, for omitting in the certificate, which they transmitted to the secretary of the commonwealth, to mention the portion of votes which were given at the election for George Odiorne Esq., who was one of the candidates.

The indictment was founded on that clause of the act of 1833, ch. 68, which declared, "that if the mayor, or either of the aldermen or ward officers of the city of Boston, shall neglect to perform any of the duties, which by that act they are required to perform, each officer so neglecting shall forfeit and pay a sum not exceeding \$200 nor less than \$30."

It was contended, at the trial, by Messrs. Pickering and Dunlap, the counsel for the defendants, that unless the neglect was wilful, they ought to be acquitted. But the court instructed the jury, that they might find the defendants guilty, unless they on their

part should satisfy the jury, that the omission did not proceed from carelessness which might not have been prevented by ordinary care. This opinion was founded on the language of the act, which imposed the penalty for neglect only, for a simple act of negligence. It was considered that the legislature might punish for neglect in a matter of great political importance, even though it did not flow from malice or wilfulness. It appeared in that case, that the defendants discovered the error, and made a new return to the secretary of the commonwealth, within the time limited by law, in which new return the error was corrected ; and on this ground they were acquitted. But in the Revised Statutes, 6th chapter, 12th section, the penalty is now made to arise only from cases of wilful neglect.

The case of *Respublica v. Powell*, 1 Dallas, 47, was for a cheat at common law. The defendant was employed by the United States as a baker, and fraudulently marked 219 barrels of bread as weighing 88 lbs. each, whereas they severally weighed only 68 lbs.

Mr. Lewis contended, in behalf of the defendant, that the statute of 33 Hen. 8, c, 1, which made cheating with false tokens an indictable offence, was not in force in Pennsylvania.

The attorney general, Sergeant, insisted that the defendant was liable to the indictment, because his employment was in nature of a public trust, and that the offence was a fraud at common law.

The court said, that it was clearly an injury to the public ; and that the fraud was more easy to be perpetrated, since it was the practice to take the barrels of bread at the marked weight, without weighing them. The public could not by common prudence prevent the fraud, as the defendant was himself the officer of the public *pro hac vice*. They therefore decided that it was an indictable offence.

The last case to which I shall refer, on which the attorney for the commonwealth relied, was the *King v. Mawbey and others*, 6 Term R. 619. It was an indictment for a conspiracy to prevent the course of justice by producing in evidence a false certificate, that a highway (indicted) was in repair, to influence the judgment

of the court. It was decided, that it was not necessary to set forth that the defendants knew at the time of the conspiracy that the contents of the certificate were false : it was sufficient that for such purpose they agreed to certify the fact as true, without knowing that it was so. In this case there was a wilful and fraudulent agreement by the defendants, to make a certificate to influence the court, without knowing at the time whether it was true. They were bound to know that it was true, before they signed the paper.

Lawrence, one of the justices of the king's bench, in pronouncing his opinion, said : "it is not unlike the case of perjury, where a man swears to a particular fact without knowing at the time, whether the fact was true or false ; it is as much perjury as if he knew the fact to be false, and equally indictable."

Sergeant Hawkins, in his Pleas of the Crown, B. i. ch. 69, sect. 6, says, "it is said not to be material, whether the fact which is sworn, be in itself true or false ; for howsoever the thing sworn may happen to prove agreeable to the truth, yet if it were not known to be so by him who swears to it, his offence is altogether as great as if it had been false, inasmuch as he wilfully swears that he knows a thing to be true, which at the same time he knows nothing of, and impudently endeavors to induce those before whom he swears to proceed upon the credit of a disposition which any stranger might make as well as he." Palm. 294 ; 3 Inst. 166 ; 2 Roll. Abr. 77.

I have endeavored to pay close attention to the argument of the learned attorney for the commonwealth, and to the authorities on which he has relied, in support of this indictment ; and it appears to me, that they are altogether founded on the principle, that the act of the defendants was by them done wilfully if not corruptly : and yet, I do not find, that what is charged against them in the indictment, is therein alleged to have been done *wilfully*, or with *any unlawful intent*. In drawing the indictment, every allegation of unlawful intent is carefully omitted : and yet, it is an elementary principle, that to render a party criminally responsible, a vicious will must concur with a wrongful act. 1 Starkie on C. P. 177.

An indictment is a true description of an offence, and must

contain all circumstances which are essential to its commission. The omission of any material circumstance cannot be supplied by intendment, nor after verdict. Nothing is to be considered in the indictment which is not plainly expressed, or necessarily implied. The rule applicable to all cases is, "that the special manner of the whole fact ought to be set forth with such certainty, that it may judicially appear to the court, that the indictors have not gone upon insufficient premises." Bac. Abr. tit. Indictment (G.) "Therefore no periphrasis, or circumlocution whatsoever will supply those words of art which the law hath appropriated for the description of the offence." "But the indictment must expressly allege every thing material in the description of the substance, nature, and manner of the crime." Ib. It is said, therefore, by lord Mansfield, in *The King v. Woodfall*, 5 Burr. 2667, "where an act in itself indifferent, if done with a particular intent becomes criminal, there the intent must be proved and found: but where the act is in itself unlawful, the proof of justification or excuse lies on the defendant, and on failure thereof the law implies a criminal intent." Lord Ellenborough, referring to this passage, in *The King v. Phillips*, 6 East, 473, remarks, "Now the intent cannot be *proved and found*, so as to sustain the indictment, where a criminal intent is necessary to accompany the act, unless the intent be also therein *alleged*." "If any particular bad intention accompanying the act be necessary to constitute it a crime, such intention should be laid in the indictment. In many cases the allegation of intent is a merely formal one; being no more than the result and inference which the law draws from the act itself, and which requires no proof but what the act itself supplies: as in the case of libels, where the fact of publication is not in question. But where the act is indifferent in itself, the intent with which it was done then becomes material, and requires, as any other substantive matter of fact does, specific allegation and proof. And after verdict every material allegation in the indictment must be taken to have been proved."

It is not charged against the defendants, in these indictments, that they certified and made oath to the truth of a return, which

they *knew* to be false, or had reason at the time to *suspect* was false. That would have been wilful perjury within the meaning and intent of the Revised Statutes, ch. 128, s. 2. It is not alleged against the defendants, that they, intending to deceive and defraud the public, *conspired* together to make and publish this false certificate; or that they *wilfully* neglected and omitted to examine and compare the books of the bank with the cashier's return, knowing that to be false: nor is it intimated in the indictment, that they had any reason to believe, that the books did not indicate the truth of the statement. Stripping it of technical language, and reducing it to its elements, it charges only, *that the defendants did not examine the books as they ought to have done, and did not ascertain the truth of the return, and that without any such examination, and without knowing the state of the books, they made and swore to the certificate and that the return was false: it concludes, that they thereby committed an official misdemeanor, and criminal neglect of duty in their office of directors of the bank, against the peace, &c.*

It is not alleged, that this act was done wilfully, by them or with any unlawful intent;—and yet to constitute a misdemeanor at common law, growing out of the infraction of a statute, it must be alleged, according to all books of entries and precedents, that it was done wilfully and for an unlawful purpose. If the act done by the complainants, which is described in this indictment, might have been done innocently, by inadvertence, or through mistake of duty, or even in ignorance, from incapacity to understand the books, the act though highly faulty and imprudent, would not amount to a crime. Such an act may have been full of hazard to themselves and to the bank, and highly inconsistent with their duty as directors, without, however, subjecting them to a criminal accusation at common law, which always includes something wilful, or corrupt, and done with an evil intent.

The conclusion of an indictment, “that the act was against the peace, and contrary to the form and effect of the statute,” will not help an imperfect description. Nor is there any particular offence known in law, as an “official misdemeanor and a criminal neglect

of duty ;" although this may be applied to any offence, committed by a public officer, by the negligent performance, or wilful omission of an act of duty. What is so denominated must be first described in appropriate, legal language. "Those circumstances mentioned in the statute to make up the offence, shall not be supplied by the general conclusion, *contra formam statuti*. 2 Hale, 170. It is not sufficient in an indictment, to describe an action, which may be either innocent or unlawful, and then call it a crime. In the very description, you must include the evil qualities of the deed. For where words admit of doubtful signification, and may receive two constructions, the one consistent with law and right, and the other contrary thereto ; the judge is bound, by the humanity of the common law, and in favor of innocence, to adopt the most favorable construction for the party accused.

It is very apparent, that the statute intended, that the return should be made from the books of the bank, and that the directors should give to it, by their certificate, the sanction of their personal knowledge ; because they are required to certify on oath, that the books indicate its correctness. The statute does not, however, require them in express words, "to examine the books and to compare with them the return." It leaves to their discretion, to pursue their own method, in satisfying themselves of the state of the books and the correctness of the return. If then they should appoint one or more of their number, skilled in accounts, to compare the return with the books, and should make their certificate on the report of such committee ; it could not be said, that they did the act without examination, and without knowledge ; and yet the return, even under these circumstances, might prove to be incorrect.

If the directors of a bank should undertake to examine and compare the books with the cashier's statement, what degree of examination will satisfy the law ? One director will content himself with a slight inspection ; but a more careful and conscientious director will choose to go into a thorough examination, so as to be satisfied, that the books are correct, as well as that they indicate the state of facts contained in the return. The law, presuming that directors will act in good faith, seems also to presume, that

they will perform this task with intelligence, and according to their sense of duty. It may be done very imperfectly. The return may be very erroneous, and mislead the public to their great injury. But unless the fault shall arise from wilful misconduct on their part, I am constrained to believe, that it was not intended to be a subject of criminal accusation.

For the neglect of its officers to make a return, the bank is made liable to a heavy penalty, by the 66th section of this chapter. The directors also are liable in their private capacities for mismanagement and lack of vigilance: for it is their duty to administer the concerns of the bank according to the provisions of law, and to exercise a vigilant supervision over the cashier, and over all subordinate officers, which in some cases is both salutary and necessary, and in all would be attended with good effect. But unless something is done by the directors, unlawfully and wilfully, and with intent to defraud or to injure the public, or some individual, it is not matter for an indictment, either at common law, or on the statute.

Both these banks have failed; and I am aware, that a great prejudice exists in the mind of the public, against their managers. Without doubt there may have been great imprudence and misconduct. But the defendants are not charged with general mismanagement, or neglect in the performance of their trust, but with a specific act: and the question is, whether the act charged is clearly defined to be an offence, and is within the meaning and intent of the law.

The brief report of the Commonwealth *v.* John Mycall, Esq., 2 Mass. Rep. 136, is full of instruction. He was a justice of the peace for the county of Worcester, and issued a writ of attachment in favor of one T. W. against one J. K. directed to the sheriff of the county of Essex, and to his deputies, and to the constable of Harvard within the same county. The writ was served by a constable of Harvard, in the county of Worcester, and returned to the defendant. The indictment charged, that the defendant, before the time of trial, did unlawfully erase in and from the said writ the word Essex, and did falsely and unlawfully

insert in the room and place thereof, the word Worcester, thereby unlawfully and falsely changing the same writ from a writ directed to the sheriff of the county of Essex or either of his deputies, or the constable of Harvard within the same county, to a writ directed to the sheriff of the county of Worcester, or either of his deputies, or the constable of Harvard within the same county, with an intent to injure, oppress, wrong and defraud the said J. K. against the peace, &c.

Upon his trial at the supreme judicial court, Worcester county, April, 1805, the defendant was convicted: and a motion in arrest of judgment was sustained by the court (chief justice Parsons, Sedwick and Sewall justices), on the ground, that the charge being for altering a writ after the service of it, and before entry, contained no technical description of forgery, and that there was no lesser offence of that kind.

The attorney general (Sullivan), said it was not the intention of the grand jury, who found the bill, to charge the defendant with the crime of forgery.

The supreme court would not sustain a novel mode of proceeding, not according to the established forms of law. The more simple and intelligible the accusation of guilt, the easier is it for a citizen unjustly accused, to defend himself against it. It ought to be understood, that the various provisions of law, by which even the guilty sometimes succeed to screen themselves from deserved punishment, are designed for the protection of innocence. According to the attorney general, in that case, the grand jury were willing to accuse Mycall with the unlawful deed done, but they were not willing that the law officer of the commonwealth should describe the offence in such legal and technical form, as would subject the offender to punishment. As to the form of the indictment, the jury had no concern. In refusing to return an indictment according to the well known established forms of law, they assumed on themselves the responsibility of a refusal and failure to perform their duty.

The law required these defendants to certify on oath, to the truth of the cashier's return. In compliance with the letter of

the law, they have made and sworn to such a certificate, which proves to be false. If this was done by them wilfully, knowing at the time, or having reason to suspect, that it was false, the offence was perjury within the letter and spirit of the Revised Statutes, ch. 128, § 2, and nothing else. For to do an act wilfully is "to act contrary to a man's own conviction." 1 East's R. 563, note (a). But the indictment makes no such charge. It lacks not only the technical description of the crime of perjury, but of any other offence known in law. Even the guilt of perjury may be incurred, as we have seen from the authorities cited, by swearing to a fact as true, when it was not known to be so by the party, and with reckless indifference whether it was true or false. Although criminality may be inferred in some cases from certain facts proved ; yet such inference is precluded in this case by the omission to allege any wilful intent. In the entire absence of a charge of criminal intent, the court cannot infer one, nor would a jury have right to infer one ; and the judgment would be arrested, if the jury should return a verdict of guilty. A further trial of this indictment would be a waste of time, and could be followed by no good consequences. It might even be a ground to reproach the inefficacy of legal forms. Both indictments being essentially defective and incurable, the defendants ought not to be required to answer to them further :—It is the order of the court, therefore, that they be quashed, and that the defendants be discharged.

**NOTE.** For the opinion of the court, overruling the plea in abatement, mentioned on page 170, see *The Law Reporter*, No. 5, for September, 1838, published in Boston.

## LEGISLATION.

**MAINE.** At the January session, 1838, of the legislature of Maine, fifty-three public acts, one hundred private acts, and one hundred and six resolves, were passed.

*Petitions to the legislature.* A statute of the last session, "directing the manner of disposing of petitions to the legislature, in certain cases," was repealed. The act repealed is inserted in the Am. Jur. vol. xviii, p. 199, together with some editorial remarks, to which the repeal may possibly in part be attributed. Chap. 305.

*Attachment.* The following articles, viz.: one plough of the value of ten dollars, one cart of the value of twenty-five dollars, one harrow of the value of five dollars, all necessary hand farming tools of the value of ten dollars, and one cooking stove of the value of thirty-five dollars, are exempted from attachment, on mesne process, or execution. Chap. 307.

*Attorneys.* The committee, required by a statute of the last year (see Am. Jur. vol. xviii, p. 200) to be appointed in July of each year, is to be appointed in April (chap. 304); and all persons, admitted to practise in the court of common pleas, and of regular standing at the bar thereof, are authorized to conduct, manage and argue all cases, both of law and fact, in the supreme judicial court. Chap. 318.

*Transfer of stock.* The stock of any company, incorporated by a law of Maine, the capital stock of which is divided into shares, may be transferred by the indorsement (by the signature of the proprietor, or his attorney, or representative), and delivery, of the certificates thereof, and an entry of such transfer on the records of the company, so far as to show the names of the parties and the date of the transfer. Chap. 326.

*Mortgages of real estate.* The mortgagee or his assigns may foreclose, by publishing three weeks successively in some newspaper printed in the county, where the estate is situated, a notice of his claim thereto by mortgage, and that the condition in the same has been broken, by reason whereof he claims to foreclose such mortgage ; or by causing such notice to be served on the mortgagor or his assigns ; and by recording such publication or service, in the registry of deeds where the mortgage is recorded, within thirty days. Chap. 333.

*Illegitimate children.* An illegitimate child shall be considered as an heir of the person, who shall have been adjudged the putative father, by any court of competent jurisdiction, or who shall in writing acknowledge himself the father of such child, and, in all cases, as the heir of the mother ; but, such child shall not be allowed to claim, as representing his father or mother, any part of the estate of his or her kindred, either lineal or collateral ; and, if any illegitimate child shall die intestate, without lawful issue, his estate shall descend to his mother, or, in case of her decease, to her heirs at law. Chap. 338.

*Divorce.* A divorce from the bands of matrimony may be decreed, in case either of the parties is or shall hereafter become a confirmed and common drunkard, and shall so continue for the space of three years, thereby incapacitating him or herself from making suitable provision for or taking proper care of his or her family. Chap. 342.

*Attachment of real estate.* The officer, making an attachment of real estate on mesne process, is required to file an attested copy of his return, in the office of the registry of deeds, in the county or district where the estate lies, with the names of the parties in the suit, the sum sued for, the date of the writ, and the court to which the same is returnable, within five days after the attachment. Chap. 344.

*Lands forfeited to the state.* Where land has been sold by the state and conveyed by a conditional deed, and the title to the same has become forfeited in consequence of the non-performance of the condition, the purchaser or persons claiming under

him may revive and secure the title to such lands, by payment, or performance of the condition, within two years from March 23, 1838, (except where the state has already conveyed the forfeited land, or where a controversy is pending relative to the title thereto). The same privilege is also extended to all cases of forfeiture, which may take place within one year from the said March 23. Chap. 352.

**NEW HAMPSHIRE.** The general court of New Hampshire, at the June session, 1838, passed sixty public acts and resolves, and twenty-five private acts.

**Attorneys.** Any citizen, of the age of twenty-one years, and of good moral character, may, on the recommendation of any attorney within the state, petition the superior court to be examined for admission as an attorney therein ; and upon an examination, in pursuance of such application, may be admitted to practise as an attorney in said court, and in all other courts of the state, upon taking the oaths prescribed by law. Any person, having been admitted an attorney or counsellor of the highest court of any other state, of which he was an inhabitant, and afterwards becoming an inhabitant of New Hampshire, may be admitted to practise there, upon satisfactory evidence of his good moral character, and his professional qualifications. Chap. 371.

**Suffrage.** Every male citizen of twenty-one years of age or upwards (excepting paupers and persons excused from paying taxes at their own request), who shall have resided within the state six calendar months, and within the town or place where he may claim the right to vote three calendar months, next preceding the day of the meeting at which he shall claim such right, shall have the right to vote therein. Chap. 384.

**CONNECTICUT.** The general assembly of this state, at the last May session thereof, passed sixty-nine public acts, and several private acts and resolutions.

**Cruelty to animals.** The wanton and cruel beating or torturing of any horse, ox, or other animal, whether belonging to the offender, or not, is made punishable by imprisonment in a common

jail, not exceeding one month, or by fine not exceeding twenty dollars. Chap. 2.

*Imprisonment for debt.* The act of the May session of 1837, to abolish imprisonment for debt, is repealed (see Am. Jur. vol. xviii., p. 113), and the following provisions are substituted therefor. When the defendant in any action, founded on contract, who has resided in the state for at least three months preceding, is arrested on mesne process, he may require the officer forthwith to take him before a justice of the peace, for the purpose of having the poor debtor's oath administered to him. If, however, the plaintiff or his agent has made affidavit, before the authority issuing the writ, that he verily believes that the defendant has assigned, removed, or disposed of, or is about to dispose of any of his property, with intent to defraud his creditors, or is about to remove from the state, in such case, the justice, before administering the oath, must give the plaintiff four days notice, to appear and show cause. If no cause be shown, the applicant is then to be examined, the oath administered, and the party discharged. Chap. 33.

*Interest.* The computation of interest according to the standard laid down in Rowlet's tables, is declared to be valid to all intents and purposes. Chap. 35.

*Fugitive slaves.* Provision is made, by chap. 37, "for the fulfilment of the obligations of this state, imposed by the constitution of the United States, in regard to persons held to service or labor in one state, escaping into another, and to secure the right of trial by jury," in the cases mentioned in the said act.

*Spirituos liquors.* The civil authority and selectmen of each town are authorized, by a vote of two thirds, at a meeting for the purpose to be held annually in the month of January, to prohibit the retailing of wine or spirituous liquors within the town, for the year ensuing, in any quantity less than five gallons.

If there be no such prohibition, any person may sell wine or spirituous liquors, in less quantity than five gallons, to be taken and carried away at one and the same time, provided he previously lodge with the town clerk of the town, a bond with surety to the satisfaction of the selectmen, in the penal sum of three

hundred dollars, conditioned for the due observance of all the laws relating to the sale of spirituous liquors.

One of the laws, for the due observance of which the bond is given, provides, that "no person shall sell directly, or indirectly, by an agent or otherwise, to any person or persons, nor authorize, or permit to be sold, any wine or spirituous liquors, mixed or unmixed, to be drunk in his or her house, shop, distillery or any other place, or dependencies, nor suffer or permit the same, when so sold, to be drunk as aforesaid, nor keep the same for sale to be drunk as aforesaid."

The provisions of this act are not to be construed to prevent the keeper of any tavern, or house of public entertainment, duly licensed for the purpose, from selling wine and spirituous liquors to be drunk therein, nor to prevent apothecaries from selling spirits for medicinal purposes. Chap. 53.

*Amendments of the constitution.* The amendment proposed in 1837 (see Am. Jur. vol. xviii, p. 515) respecting the appointment of the judges of the supreme court of errors and of the superior court, and to the tenure of their office, does not appear to have been confirmed. A resolution of the same session, for an amendment, relating to the choice of sheriff by the electors of each county, was confirmed, and provision made for submitting it to the votes of the people. Chap. 10.

A resolution of the same session, for an amendment, relating to the qualification of electors, appears to have passed, but we do not perceive any provision made for submitting it to the people.

Resolutions passed, and were continued to the next May session, proposing amendments, authorizing the election of judges of probate, and justices of the peace, by the people.<sup>1</sup>

**NEW YORK.** The legislature of New York, at the sixty-first session thereof, which commenced January 2, 1838, passed three hundred and thirty-three acts, and four concurrent resolutions.

<sup>1</sup> Amendments of the constitution of Connecticut are made by the concurrent votes of the house of representatives of one, and of both branches of the succeeding general assembly, and the approval of a majority of the electors.

**Auctioneers.** Any citizen of New York is authorized to become an auctioneer, upon executing and depositing with the comptroller, a bond for the payment of auction duties. Chap. 52.

**Executors.** In actions brought by or against executors, it shall not be necessary to join those as parties, to whom letters testamentary shall not have been issued, and who have not been qualified. Chap. 149.

**Railroads.** Wilful injuries (other than those from which the death of a human being shall result) to railroads are made punishable by imprisonment, not exceeding five years in the state prison, or in a county jail not less than six months. Chap. 160.

**Lunatics.** The revised statutes are so amended, as to authorize the confinement of lunatics, in certain cases, "in such private or public asylum, as may be approved by any standing order or resolution of the supervisors of the county, or in the lunatic asylum in the city of New York." Chap. 218.

**Partners.** On the dissolution of any copartnership, by consent or otherwise, any of the partners may make a separate composition or compromise with any or all of the creditors of the firm, without thereby discharging the others, or impairing the right of any creditor to proceed against them at law or in equity. Chap. 257.

**Chancery proceedings.—Trial by jury.—Testimony.** Either party in a suit in chancery may require a trial by jury in all cases, in which, in the opinion of the court, an issue of fact suitable for the determination of a jury, on a material point in a cause, can be framed; or the court may order the same, when no request is made by either party; and, on the trial of such issue, the defendant's answer, or any other pleadings or papers proper to be read as testimony in the court, in which the cause is pending, may be read as evidence.

The court may prescribe a short and convenient form, to contain the issue to be submitted to the jury, by way of interrogatory or otherwise, on which the jury may find a general or special verdict.

In those cases, in which, in the judgment of the court, an issue

cannot be framed for a jury, the testimony to be given shall be given orally, except when the witness resides more than one hundred miles from the place of trial, or out of the state, or is unable to attend, in which cases, the testimony may be taken in the manner now prescribed by law. Chap. 258.

**NEW JERSEY.** The sixty-second general assembly of this state commenced its first sitting on the twenty-fourth of October, 1837, and terminated its second on the first of March, 1838; and, during these sessions, passed one hundred and twenty-one statutes, and fifteen resolutions.

*Measuring and sale of grain.* From and after July 4, 1838, the bushel is to consist of sixty pounds of wheat; fifty-six pounds of rye or Indian corn; fifty pounds of buckwheat; forty-eight pounds of barley; thirty pounds of oats; fifty-five pounds of flaxseed; and sixty-four pounds of clover seed.

*Punishment of death.* An act, to abolish the punishment of death in certain cases, provides, that there shall be three degrees of murder, namely: 1. whenever the homicide shall be perpetrated from a premeditated design to effect the death of the person killed or of any human being, it shall be murder in the first degree; 2. when perpetrated by any act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual, shall be murder in the second degree; and, 3, when perpetrated without any design to effect death, by a person engaged in the commission of any felony, shall be murder in the third degree.

The punishment of murder in the first degree is death; of murder in the second degree, solitary imprisonment for life at hard labor; and of murder in the third degree, imprisonment at hard labor for any term not exceeding twenty years.

Any person, so sentenced to imprisonment for life, is to be considered and esteemed as civilly dead, and the same disposition to be made of his estate, as if he had died on the day of the sentence.

*State prison.* An act for the government and regulation of the state prison, which has been recently erected in this state, contains minute regulations digested in seven articles, for the performance of the duties of the several officers thereof. This institution is on the plan of the Pennsylvania penitentiaries.

**PENNSYLVANIA.** The general assembly of this state, at the session thereof, which commenced in December 1837, and terminated in April 1838, passed ninety-eight statutes and twenty-two joint resolutions, very few of either of which relate to the general laws.

*Actions by and against partners.* Actions by and against partners are not to be abated or defeated, by reason of one or more individuals being or having been members of both firms, or being or having been of the parties plaintiffs and also of the parties defendants in the same suit. No. 75.

The same statute, which contains the foregoing provisions, and which is entitled "An act relating to the commencement of actions, to appeals from county auditors, and for other purposes," furnishes an example of a mode of legislation, more common, we believe, in Pennsylvania, than in any other of the United States. We allude to the slovenly and very improper practice of introducing several incongruous subjects into the same statute, under the unmeaning title of "other purposes." The statute above-mentioned, besides the section concerning actions by and against partners, contains provisions relating to the inspection of butter and hog's lard,—the boundaries of the borough of Alleghany,—certain free road and turnpike companies,—the payment of the Cumberland county school teachers,—and the appointment of a measurer of marble.

*Limited partnerships.* The general partner, in any limited partnership, is authorized, with the assent in writing of his partner, to sell or dispose of his interest in the partnership, by deed or will. This important enactment is found, not where one would look for it, in a statute, but in a joint resolution (No. 19), "relative to the state library and for other purposes!"

We cannot help adding, that the volume containing the above statutes of the state of Pennsylvania, which purports to be printed by Theodore Fenn, and "published by authority," at Harrisburg, is altogether the meanest, in point of typography and paper, which we have ever seen devoted to the purpose of promulgating the laws of any state or country whatever.

**MARYLAND.** The general assembly of Maryland, at a session begun December 25, 1837, and ended March 30, 1838, passed three hundred and sixty-three acts (almost all of a private character) and seventy-nine resolutions.

*Amendments of the constitution.* An act, passed at the preceding session, to amend the constitution and form of government, (see *American Jurist*, vol. xviii, p. 505) was confirmed. Chap. 84.<sup>1</sup>

*Rules of court.* Chapter 116, reciting, that "courts have and exercise a discretionary power of establishing and altering rules, which, in their operation, are as binding as the acts of the legislature, and ought therefore to be printed and published," makes it the duty of the clerks of the county courts, to publish such rules in the newspapers printed in their several counties.

*Injuries by fire from railroad engines.* If any woods, fields, or other property, real or personal, shall be burned or injured, by the fire or sparks from any locomotive engine or other machine, the railroad company, in whose use or on whose road the engine is employed, is made responsible for damages equal to the injury. Chap. 309.

*Maryland penitentiary.* The several acts, relating to this institution are consolidated, and regulations for the government and discipline thereof prescribed, by chapter 320.

*Felony.* The taking and carrying away of corn from the stalk, to the amount of a peck or more, with a felonious intent to convert the same, is made a felony, punishable by confinement in the penitentiary, for not less than two nor more than five years. Chap. 361.

<sup>1</sup> We believe, that amendments of the constitution of Maryland are effected by the concurrent acts of two successive general assemblies.

**VIRGINIA.** The general assembly of Virginia, at the session thereof, which commenced January 1, and ended April 9, 1838, passed three hundred and thirty-one statutes (one hundred and forty-five of which were of a public and general nature), and thirteen resolutions.

*Landmarks.* The wilful destruction, obliteration, or removal of landmarks, is made a misdemeanor. Chap. 9.

*Solitary confinement.* So much of the criminal law, as requires the infliction of solitary confinement, in cases of conviction of felony, is repealed; and the same is to be dispensed with, except so far as may be necessary for the proper discipline and good government of the penitentiary or jail. Chap. 26.

*Limitations.* In actions grounded upon any simple contract, no acknowledgment or promise shall be deemed sufficient evidence of a new or continuing contract, so as to take the same out of the operation of the statute of limitations, and no action shall be maintained, whereby to charge any person upon any promise after full age, to pay any debt contracted during infancy, or upon any ratification after full age, of any promise or contract made during infancy, unless such acknowledgment, promise, or ratification shall be made by some writing signed by the party to be charged therewith. Chap. 95.

*Burning in the hand.* This part of the old common-law punishment of felony is abolished. Chap. 100.

*Concealed weapons.* The habitually or generally keeping or carrying, by any one, about his person, in such a manner as to be hidden or concealed from common observation, of any pistol, dirk, bowie knife, or other weapon of the like kind, from the use of which, the death of any person might probably ensue, is made punishable by fine not exceeding five hundred dollars, or imprisonment not exceeding six months. Chap. 101.

**GEORGIA.** The general assembly of this state, at its session in November and December, 1837, passed a considerable number of laws and resolutions, mostly of a municipal or private character. The statutes are arranged alphabetically, without regard to the order of time.

*Constitution.* Three acts were passed, for amendments of the constitution;

1. Relating to the judiciary.
2. Changing the election of members of the general assembly from annual to biennial, and enlarging the term of office of the state's attorney and solicitor, from three to four years.
3. Relating to the pardoning power. The present constitution authorizes the governor "to grant reprieves for offences against the state, except in cases of impeachment, and to grant pardons, or to remit any part of a sentence in all cases after conviction, except for treason or murder, in which cases he may respite the execution, and make report thereof to the next general assembly, by whom a pardon may be granted." The amendment proposes to authorize the governor, in cases of treason or murder, to commute the punishment to imprisonment in the penitentiary for a term of years, or to respite the execution, and to make report thereof to the next general assembly, for pardon or commutation by that body.<sup>1</sup>

*Deadly weapons.* It is made a high misdemeanor, punishable by a heavy pecuniary fine, for any merchant or vender of wares or merchandize, or any other person, to sell or offer to sell, or to keep, or have about their person or elsewhere, any bowie or other kind of knives (including also pistols, dirks, sword canes, spears, &c.) manufactured and sold for the purpose of wearing or carrying the same as arms of offence or defence.

*Evidence.* Oral evidence, to show that a deed or bill of sale, absolute on its face, is intended as a mortgage or security, is prohibited to be received in any court, unless there is a charge of fraud in obtaining the same, in which case, oral evidence of the fraud may be received.

*Limited partnerships,* like those already authorized in many of the other states, on the *commandite* principle, are authorized to be formed by two or more persons, for almost all purposes except banking and insurance.

*Partners.* The insertion or use, by any partnership, in their

<sup>1</sup> The constitution of Georgia may be amended by two thirds of the legislature, at two successive sessions.

partnership style or name, of the name of any individual not actually a copartner, is prohibited under a penalty of one hundred dollars for each day, during which the same may be so used.

**LOUISIANA.** The thirteenth legislature of this state, at its second session, which commenced December 11, 1837, and terminated March 12, 1838, passed one hundred and fifteen acts and resolutions.

**Succession.** Where a succession is so small, or is so much in debt, that no person will apply for or be willing to accept the curatorship, the judge of probate is authorized to confer the same, without any previous notice, on such person as he may think proper; and the curator, so appointed, is authorized to sell the estate and appropriate the proceeds to the payment of the debts of the deceased, in as summary a manner as possible. No. 7.

**Bills of exchange.** The rate of damages, to be allowed and paid upon the usual protest for non-acceptance or for non-payment of bills of exchange, drawn or negotiated within the state of Louisiana, is established as follows, viz.: on all bills of exchange drawn on and payable in foreign countries, ten dollars upon the hundred upon the principal sum specified in such bills; on all bills of exchange drawn on and payable in any other state in the United States, five dollars upon the hundred upon the principal sum specified therein.

The damages, above provided, are to be in lieu of interest, charges of protest and all other charges, incurred previous to and at the time of giving notice of non-acceptance or non-payment; but the holder may demand and recover lawful interest upon the aggregate amount of the principal sum specified in the bill, and of the damages thereon, from the time at which notice of protest for non-acceptance or non-payment shall have been given, and payment of such principal sum shall have been demanded.

If the contents of a bill are expressed in the money of account of the United States, the amount of the principal, and of the damages for the non-payment or non-acceptance, are to be ascertained and determined, without any reference to the rate of exchange existing between Louisiana and the place on which the

bill is drawn, at the time of the demand of payment, or notice of non-acceptance or non-payment.

If the contents of a bill are expressed in the money of account or currency of any foreign country, the principal and damages are to be ascertained and determined by the rate of exchange, but whenever the value of such foreign coin is fixed by the laws of the United States, the value so fixed is to prevail.

The following days are to be considered as days of public rest in Louisiana, viz. : the first and eighth of January, the twenty-second of February, the fourth of July, the twenty-fifth of December, Sundays and Good Friday. All bills of exchange and promissory notes are made due and payable on the second day of grace, when the third is a day of public rest, and on the first day of grace, when both the second and third are days of public rest ; in computing the delay allowed for giving notice of non-acceptance or non-payment of a bill or note, the days of public rest are not to be counted ; and, if the day or two days next succeeding the protest for non-acceptance or non-payment are days of public rest, then the day next following is to be computed as the first day after protest. No. 52.

**KENTUCKY.** The general assembly of Kentucky, at the December session, 1837, passed four hundred and eighty-four acts, almost all of which are of a private or municipal character, and several joint resolutions.

**Sureties.** An act "limiting actions against sureties," provides :

1. That sureties, in bonds required by law in certain cases, as on appeal, supersedeas, injunction, &c. shall be discharged from their liability, by the lapse of seven years, after cause of action accrued thereon, without suit being instituted.
2. That sureties in administration and guardian bonds, shall be discharged from their liability, when five years, after the youngest of the legatees or wards have attained full age, shall have elapsed without suit thereon.
3. That sureties in all other written obligations shall be discharged, by the lapse, without suit thereon, of seven years from the accrual of the cause of action. Chap. 742.

*Defrauding of creditors.* An act, "to provide against fraudulent purchases, and fraudulent sales and conveyances of property, to the prejudice of creditors," gives a remedy in equity: 1, where one purchases any property, with the fraudulent intent of procuring the same without paying therefor; 2, where one sells or disposes of his property, with the fraudulent intent of cheating and defrauding creditors, or of hindering and delaying them in the collection of their debts; and, 3, where a debtor is about to remove his property out of the state, or to dispose of it, with an intent to delay, hinder, or defraud his creditors. Chap. 825.

*Common schools.* Chap. 898, in forty-one sections, provides for the establishment of a system of common schools.

*Limitation of real actions.* Chap. 941 provides, that on and after October 1, 1840, no other or longer time shall be allowed, within which to maintain a writ of right or other possessory action, upon the seizin or possession of an ancestor or predecessor, than is allowed for maintaining a real action upon a person's own seizin or possession.

*Petit jurors.* By chap. 960, the mode of selecting petit jurors by lot is introduced.

**OHIO.** The following are some of the enactments of the first session of the thirty-sixth general assembly of the state of Ohio, begun Dec. 4, 1837, and terminated March 19, 1838.

*Common schools.* An act, "for the support and better regulation of common schools, and to create permanently the office of superintendent," provides for the establishment of a school fund, —the appointment of a superintendent,—and the government and regulation of the common schools. This statute contains forty-seven sections. March 7.

*Evidence.* On the plea of *non est factum*, offered by the person charged as the obligor or grantor of a deed, or of *non assumpsit* or *nil debet*, offered by the person charged as the maker or indorser of any promissory note, or drawer, indorser, or acceptor of any bill of exchange, it shall not be necessary for the plaintiff to prove the execution of the deed, the making of the note, or the drawing or accepting of the bill of exchange, upon which the suit is

brought, or any indorsement thereon, unless the party offering such plea shall make affidavit of the truth thereof, or that any such indorsement was not made as it purports to have been. March 9.

*Idiots, lunatics, and insane persons.* An act, passed March 9, to provide for the safe keeping of idiots, lunatics, and insane persons, the management of their affairs, &c., consisting of nineteen sections, contains provisions well adapted to the end in view, which appear to be dictated by a liberal and humane spirit, and to correspond with the present state of the knowledge of mental disease. Among other useful provisions, the judge before whom an inquiry is instituted, respecting the mental state of a supposed idiot or lunatic, is directed, with the witnesses named by the complainant, to summon *at least two skilful and respectable physicians*.

*Assignments by insolvent debtors.* An act concerning proceedings in chancery, passed March 14, declares, that all assignments of property in trust, which shall be made by debtors to trustees, in contemplation of insolvency, with the design to prefer one or more creditors to the exclusion of others, shall be held to enure to the benefit of all the creditors, in proportion to their respective demands.

*Quo warranto.* The proceedings, on informations in the nature of *quo warranto*, are prescribed and regulated by a statute, passed March 17.

*Imprisonment for debt* is abolished by an act passed March 19, the details of which are too long to be inserted here, but which provide generally, that no person shall be arrested or imprisoned, on any writ or execution, founded on contract (except promises to marry, for moneys collected by any public officer or attorney at law, and for any misconduct or neglect in office, or professional employment) unless it shall be made to appear, *first*, that the defendant is about to remove his property out of the jurisdiction of the court, with intent to defraud his creditors; or, *second*, that he is about to convert his property into money, for the purpose of placing it beyond the reach of his creditors; or, *third*, that he has property or rights in action, which he fraudulently conceals; or, *fourth*, that he has assigned, removed, or disposed of, or is about

to dispose of his property, with intent to defraud his creditors; or, *fifth*, that he fraudulently contracted the debt, or incurred the obligation for which the suit is brought.

**ILLINOIS.** The tenth general assembly of this state, at their session commencing Dec. 5, 1836, and ending March 6, 1837, passed a large number of laws, mostly private or municipal, and several resolutions. Among the statutes of general interest, we observe one in fifty sections, "to establish and maintain a general system of internal improvement,"—another, "to amend the several acts in relation to common schools"—and a third, "authorizing suits against persons whose names are unknown, in certain cases."

The same general assembly, at a special session, commencing July 10, and ending July 22, 1837, passed several statutes.

*Recording of conveyances.* The recording of any deed, &c., in the county where the land is situated, is declared to be notice to subsequent purchasers and creditors, from the time of such recording, though the same is not acknowledged or proved according to the laws of Illinois. July 21.

*Words of limitation in conveyances.* Every estate in lands, hereafter to be granted, conveyed or devised, though other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed, or devised, by construction or operation of law. (§1). July 21.

*Contingent remainder.* When an estate hath been or shall be conveyed in remainder, to the child, or to the use of the child, of any person to be begotten, such child, born after the decease of the father, shall take the estate in the same manner as if born in the lifetime of the father, although no estate shall have been conveyed to support the contingent remainder after his death. (§ 2). July 21.

**MICHIGAN.** The legislature of Michigan, at the annual session of 1837, passed one hundred and twenty-six acts and joint resolutions.

*Banking associations.* Any persons, desirous of forming an association for transacting banking business, are authorized to do so, in the manner provided by an act "to organize and regulate banking associations." No. 47.

*Limited partnerships,* for the transaction of any mercantile, mechanical, or manufacturing business (but not for the purpose of banking or insurance) are authorized to be formed by two or more persons, upon the terms &c. contained in an act to authorize and regulate such associations, and which is substantially like the statutes of Massachusetts and New York on the same subject. No. 58.

*Manufacturing corporations.* Any five or more persons are authorized to incorporate themselves for manufacturing purposes. No. 121.

*Imprisonment for debt.* The commissioner, having in charge a revision of the laws, is requested not to embody the principle of imprisonment for debt in the system of collection laws, which he may report for the adoption of the legislature. Res. No. 89.

The legislature of Michigan, at the special session thereof, which commenced on the twelfth and terminated on the twenty-second of June, 1837, passed nineteen laws and resolutions, and at an adjourned session of the same year, fourteen laws and resolutions.

The acts and resolutions, passed at the regular session of 1838, are one hundred and twenty-six in number.

*State penitentiary.* A state penitentiary is located near the village of Jacksonburgh, and authorized to be built, by three commissioners appointed for the purpose, on the plan of the Auburn prison in the state of New York, with such variations, as the commissioners shall think will best promote the interest of the institution. Nos. 19 and 53.

*Revision of the laws.* We perceive, from various resolutions, passed within the last two years, that the laws of Michigan have been revised, by a commissioner appointed for the purpose, and reënacted by the last legislature, and that they are now in the course of publication, if not already published.

## CRITICAL NOTICES.

1.—*Speech of JAMES MADISON PORTER, of Northampton, in the Convention of Pennsylvania, on the subject of the right to annul Charters of Incorporation.* Delivered November 20, 1837: Philadelphia: Hay & Co.

MR. PORTER goes over the whole subject of the origin, history, and use of corporations, and considers the right of the legislature to annul or alter charters, both in a legal and political, but, chiefly, in the latter point of view. In the legal part of his speech we observe nothing new. In the political part, we are presented with some interesting details, in reference to the history of the old bank of North America, and also concerning the existing bank of the United States, the chartering of which gave occasion to the question, then under discussion in the Pennsylvania convention. The act, by which this latter institution was incorporated, was entitled, “An act to repeal the state tax on real and personal property and to continue and extend the improvements of the state by railroads and canals, and to charter a state bank, to be called the United States Bank.” Alluding to the several objects here specified, Mr. Porter remarks :

“The system of legislation, by which various projects are embodied in one act, I have ever reprobated. I think half the evils in legislation, of which we have any cause to complain, arise from this combination of laws in one bill. An appropriation bill is gotten up, and in the scramble, in order to procure some useful and necessary appropriations, a vast number of others, having no intrinsic merit, and which never could be obtained if standing alone, are introduced and passed, to procure votes of members for that which is useful. Again; by this system, the interests of various portions of the state are combined, and support is ob-

tained for an entire bill, for no one provision of which, if separated from the rest, could a respectable vote be obtained. The variety of objects embraced in this bill for chartering the bank of the United States, made it objectionable in this point of view, independent of the objections to the provision for chartering a bank with more capital than all the other banks in the state possessed. And no man can doubt, that the bill would not have been passed, but for the provisions contained in it for various internal improvements, and for the advancement and support of the cause of education. But even these have not entirely recommended it to the people at large, and softened down their objections to it. If, however, there be no actual fraud in the obtainment of the charter, no matter how improvident a bargain the state has made, she is bound by it—a bargain is a bargain."

In accordance with these views, Mr. Porter proposed to amend the bill of rights, by providing that the legislature should not have power "to combine or unite in any one bill or act, any two or more distinct subjects or objects of legislation, or any two or more distinct appropriations or appropriations to distinct objects;" but what was the fate of this proposition we are not informed. It seems to us that it would hardly operate to cure the evil, against which it was directed. The kind of corruption practised in this way (denominated *log-rolling* in some parts of our country), would be carried on just as effectually by separate and distinct bills, as by packing together all the pet projects of several minorities into one bill. Mr. Porter quotes largely from one of Paine's essays, which, we are inclined to agree with him, have fallen into unmerited neglect, by reason of their author's avowed sentiments on the subject of religion. Paine was an able and popular political writer, and did much, by his pen, to forward and sustain the cause of American independence. But the gross and offensive attacks upon the christian religion, in which he indulged, long after his services to the United States, and towards the close of his life, have thrown his whole character and labors into disgrace. No trifling degree of courage would be requisite, we should think, to quote his writings as authority, in any deliberative assembly, at the present day.

2.—*Select Cases from the Records of the Supreme Court of Newfoundland; with a Table of the names of Cases, and an Appendix*: Henry Winton, St. Johns, Newfoundland; & Baldwin & Cradock, London, 1829.

The period, embraced by the cases reported in this volume, commences in July 1817, and terminates in June 1828. From the beginning of this period to the 6th of May, 1822, the office of chief justice of the supreme court of judicature in Newfoundland, was filled by Francis Forbes, Esq., of Lincoln's inn, barrister at law. He was succeeded, on his resignation, in September, 1822, by Richard Alexander Tucker Esq., of the Inner Temple, barrister at law, who took his seat in the supreme court on the 5th of May, 1823, and continued to preside there, as the sole judge thereof, until the 2d of January, 1826, when the royal charter, granted by the king to the supreme court of Newfoundland, under the provisions of the 5th George IV, ch. 67, was promulgated, and the bench was then filled by the Hon. Richard Alexander Tucker, chief judge, the Hon. John William Molloy, and the Hon. Augustus Wallet Des Barres, assistant judges. In September, 1826, the Hon. Edward Brabazon Brenton was appointed an associate judge in the room of Mr. Molloy, who had been previously removed from office. Mr. Tucker has since resigned and his place has been supplied by the appointment of Mr. Stuart, late attorney general of Lower Canada, to the office of chief judge of Newfoundland. The opinions, contained in the volume before us, from 1817 to 1822, were delivered by Mr. Forbes, and those in the residue of the cases (apparently) by the chief judge, Mr. Tucker, by whom we understand the cases were compiled and published.

The practising lawyer (out of Newfoundland) will find very little in this volume, to reward him for the trouble of a perusal; but the student of general jurisprudence, who desires to acquaint himself with the various legal systems, which are in actual operation, in different countries, will find it full of curious and interesting matter. The common law of England is in force in Newfoundland, controlled and modified, however, by the peculiar customs of the island, and by particular statutes, adapted to the condition, cir-

cumstances, and situation of the inhabitants. The following extract from an opinion of chief justice Forbes, furnishes a good illustration of this new adaptation of established principles to the circumstances of the colony.

"Our insolvent act is nothing more than the application of that part of the maritime law of Europe, which relates to ships and sailors, to the fisheries, which, in their general features, bear a strong resemblance. For example, in the adjustment of the claims upon a ship, by the laws of Europe, the seamen have a right to be paid the full extent of their wages, while a plank of the vessel remains. Next in priority of claim, are materials, and those who have furnished necessaries abroad, who claim a preference amongst each other, according to the recency of the date of their several bottomries; and, lastly, all other creditors alike. What is this but the law of Newfoundland applied to the product of a fishing voyage, instead of a ship,—to supplies for such a voyage, instead of necessaries for a foreign voyage, and to the last supplier, in preference to the one preceding, instead of the last security of bottomry? This application of the maritime law to the fisheries naturally suggested itself to the courts at home, which used formerly to determine all causes which arose in this island. It was as naturally followed by the court of vice-admiralty, which afterwards entertained civil actions; and it remains to this hour the law of the island." p. 125.

In the digest of British-American cases, contained in our last number, our readers will find examples of the peculiar customs of Newfoundland, some of which have arisen from the fact of the whole island having been originally dedicated to the purposes of the fishery. Chief justice Forbes was quite indignant, however, at the idea that Newfoundland should be considered as nothing but a fishery, and took occasion to express himself in the following terms:

"I am aware that Newfoundland has been considered as a *mere fishery*, and, by a political kind of fiction, every person in it is supposed to be either a fisherman, or a supplier of fishermen. I am not disposed to interfere with any political considerations upon the subject; but I must observe, that such a fiction differs from the true principle of legal fiction—*in fictione legis semper subsistit æquitas*; and, it is, besides, a great departure from the fact; since there is a considerable trade from this island, sanctioned by parliament, and independent of the fishery." p. 47.

3.—*A Digest of the Cases decided and reported in the Superior Court of the City of New York, the Vice Chancellor's Court, the Supreme Court of Judicature, the Court of Chancery, and the Court for the Correction of Errors, of the State of New York; from 1823, to October, 1836; with Tables of the Names of the Cases, and of Titles and References: Being a Supplement to Johnson's Digest.* Philadelphia: published by E. F. Backus, 1838.

The contents of this work are so fully set forth on the title page, that very little remains to be added, except that the number of volumes of reports digested in it amounts to thirty-three, namely: Cowen's, nine volumes, Wendell's, fifteen volumes, Hopkins's chancery reports, one volume, Paige's, five volumes, Edwards's reports of cases decided by the vice-chancellor, one volume, and Hall's reports of the superior court of the city of New York, two volumes. This digest being intended as a supplement to the well-known and very valuable work of Mr. Johnson, the arrangement adopted by him has been followed by the compilers, "so as to give to their work, as much as possible, the character of a continuation of his plan." It may be added, also, that its typographical appearance is precisely similar to that of Johnson's digest. Why have the compilers withheld their names from the public? Their work is certainly creditable to themselves; and, we have no doubt, will receive the favor of the profession.

4.—*The Practice in Civil Actions and Proceedings, in the Supreme Court of Pennsylvania, and in the District Court and Court of Common Pleas for the City and County of Philadelphia; and also in the Courts of the United States.* By FRANCIS J. TROUBAT and WILLIAM W. HALY. In two volumes. Philadelphia: R. H. Small, 1837.

The first volume of the first edition of this work was published in 1825, and the second volume of the same in 1828. The demand for a second edition, within the last year, considering that the sale of a book on Pennsylvania practice must necessarily be confined

to that state, is gratifying evidence of the estimation in which the work of Messrs. Troubat and Haly is held, by those who are the best if not the only persons capable of judging of its merits. We never could exactly understand the mysteries of Pennsylvania practice,—the administration of justice, both in law and equity, under the common law forms of procedure,—but we have an idea, that, in point of fact, justice is as well and truly administered, in that state, by the apparently clumsy arrangement to which we have alluded, as it is elsewhere by means of the equally clumsy arrangement of separate courts. The good people of Pennsylvania would have justice effectually administered, and they would not have a court of chancery ; and so they invented a mode, peculiar to themselves, by which the former seems to have been attained, without the aid of the latter. Among other inventions for this purpose, we find it laid down, that it is a general rule adopted by the courts, " that whatever would be sufficient in chancery to protect the party will be admitted in evidence under the general plea of payment ; and that shall be presumed to be *paid*, which, in equity and good conscience, ought *not to be paid*."

The alterations, which have been made by the legislature, since the publication of the first edition, are all incorporated in the present. These alterations are numerous and of great importance, in consequence of the revision by the legislature, in the summer of 1836, of various laws relating to the organization, jurisdiction, and powers of the courts, and their modes of proceeding.

5.—*Reports of Decisions made in the Superior Courts of the Eastern District of Georgia, by Judges Berrien, T. U. P. Charlton, Wayne, Davies, Law, Nicoll, and Robert M. Charlton; and in the Middle Circuit, by Thomas U. P. Charlton.*  
By ROBERT M. CHARLTON, late Judge of the Superior Courts of the Eastern District. Savannah : Thomas Purse & Co. 1838.

The situation of the state of Georgia, in reference to its judiciary organization, is so entirely peculiar in this land of law and litigation, that we shall make no scruple to extract the greater part

of the preface to the volume before us, in which the subject is fully explained by the learned judge and reporter.

“ There are ten judicial districts in the state of Georgia. For each, a ‘judge of the superior courts’ is appointed. To this judicial functionary, powers are entrusted, and duties imposed, of no ordinary character. As the presiding officer of a common law tribunal, he is called on to settle the multitude of ever-changing questions, that are presented for adjudication; to untie the Gordian knots of assumpsit and case—to thread the intricacies of the ejectment labyrinth—and to make the way straight, for those ‘good and lawful citizens of the state,’ who claim the right to recover a chattel from one, into whose possession ‘it hath come by finding.’ In this capacity, also, aided by a special jury, he determines all appeals from the petit jury of his own tribunal, or of the ‘inferior court.’ Moreover, he sits in judgment upon all appeals from the ‘court of ordinary,’ in testamentary matters, &c. Associated with the special jury, he also acts as a chancellor, and determines all questions connected with proceedings in equity. To the same jury, he expounds the law applicable to the cases of those persons, who seek a release from the silken bands of matrimony. All writs of certiorari, prohibition, mandamus, &c. emanate from, and are heard before him. Upon him too, rest the hopes and fears of the unfortunate individual, charged with the violation of the criminal laws of the country; and by his lips, the sentence of imprisonment, infamy and death is announced. That he is often called upon to perform most of these various and heavy duties within the same week, I may safely testify; that he is not required to perform them all on the same day, is not owing to any courtesy on the part of the legislature, but because that body has not the power of Joshua of old, ‘to make the sun and moon stand still’ long enough. Nor is this all. This legal Hercules is the *ultima spes* of the desponding suitor—the *ne plus ultra* of the zealous lawyer. His fiat is conclusive. There exists no tribunal, that can correct his errors, or change his decrees. The constitution of the state (as amended a few years ago), declares, that there shall be ‘a supreme court for the correction of errors,’ but the legislature of Georgia have hitherto disregarded the solemn mandate, and refused to organize such a tribunal.

“ Such (amongst others), are the duties and powers of a judge of the superior courts of the state of Georgia; duties too multifarious, and powers too extensive, to be confided to any man; and powerful indeed must be the physical abilities, and gigantic must be the intellect of that

individual, who can discharge them properly. Called upon to decide the most difficult and intricate questions without a moment's time for deliberation; compelled to charge the jury thereon, as soon as the learned and elaborate arguments of the skilful and opposing counsel at the bar have ceased, it would, indeed, be a miracle, if manifold errors were not to be found in such decisions. I have not attempted to collect these hasty and crude opinions. Those that will be found in the succeeding pages, are the written decisions of the judges of the eastern circuit of the state of Georgia, upon cases reserved, or questions of law or equity, which, not requiring the immediate action of a jury, have been submitted to the judge for his deliberate opinion. The constitution does not require him to assign written reasons for his judgments, save on motions for new trial, but the practice in our circuit (particularly of late years) has been, to give written opinions in all matters, to which deliberate investigation has been bestowed. My father, judge Thomas U. P. Charlton, had collected these opinions pronounced before 1810, and published them in a small volume, in 1824. The present work embraces all given since the former year.

"I beg leave to disclaim the title of a regular reporter. I have called myself the editor, because there was no other word in the English language, which could exactly express my connexion with the work. I have made the 'marginal abstracts,' formed the index, added few and scattering annotations to some of the decisions, and corrected the proof-sheets. This is all that I have done, and though it may be considered by the reader, as entitling me to but little praise, I can assure him, that when performed under the pressure of more important duties, it has been troublesome enough. The profession in Georgia will understand, why I could not make the volume more perfect, by adding to each case, a statement of facts and the arguments of counsel. Having no system of special pleading, it would have been in vain to have searched the records (other than the decisions of the judges), for the points in issue, and I was unwilling to trust to the fading memory of counsel, engaged in the respective cases. The decisions, generally, contain a sufficient statement of the facts, to enable the reader to ascertain the history of the case. I pray him not to rely too much on my hasty notes or abstracts, but to read, and determine for himself.

"There is one matter which requires an explanation. I have inserted decisions in this volume, which affirm principles, long since considered as settled. A good reporter, in a state or country blessed with a supreme court and a series of reports, would, of course, omit cases of this charac-

ter; but on proper reflection, I concluded, that under a system like ours, it was all-important to the profession, that principles solemnly adjudicated by our highest tribunal, should be promulgated, without reference to the fact, that they had long since been established in a different state or country. The proprietors of land which has been long settled, and every foot of ground of which is familiar to them, may, if they please, refuse to set up the marks which designate their well known boundaries or ways, but it would be unwise in the owners of a newly inhabited territory to follow such an example. We have no supreme court—each judge in each circuit is independent of the others. With the exception of the volume published by my father, and a work recently given to the profession by George M. Dudley, Esq., we have no books of reports. The same law is often differently construed in the different circuits. I trust, that under all these circumstances, I may be pardoned for disregarding the suggestion of lord Bacon, ‘that *homonymie* be purged away.’”

The circumstances, under which this volume of decisions has been prepared,—the period embraced by them,—the courts in which they occurred,—and the general character of the cases,—are so fully detailed in the foregoing extracts, that we have little to add, further than that the duties of the editor have been performed with ability and success; and that though we once expressed our fear that Georgia might be “a sterile soil for the law,” we are quite satisfied, from an examination of Mr. Charlton’s reports, that, by assiduous and careful cultivation, she may be made to yield an abundant harvest. The typographical execution of this volume is neat and correct.

6.—*Reports of Cases argued and determined in the Courts of King’s Bench and in the Provincial Court of Appeals of Lower Canada, with a few of the more important Cases in the Court of Vice-Admiralty and on Appeals from Lower Canada, before the Lords of the Privy Council: collected by GEORGE OKILL STUART, Esq. Barrister at Law. Quebec: Printed by Neilson and Cowan, 1834.*

This volume contains a collection of cases, decided by the several tribunals mentioned in the title, during a period of more than

twenty years, commencing in April, 1810, and ending in February, 1835. Mr. Stuart very modestly announces himself as the collector of the cases ; by which he probably means nothing more, than that he was not himself present at the hearing or decision of all of them. Whether however he be strictly entitled to the character of a reporter, or not, it is quite certain that he has performed the duty of one, or at least of an editor, in a very faithful and thorough manner. The facts of the cases are presented in a clear and perspicuous style,—the points and arguments of the counsel are briefly but duly presented,—and the opinions of the court are evidently prepared with much care and attention. Every part of the volume, indeed, is highly creditable, in a literary as well as a legal and judicial point of view, to all whose labors are displayed on its pages.

One of the chief inducements to the publication of these reports, Mr. Stuart informs us in his preface, was a consideration of the “dangers to which parties must every where be subjected from the want of reports of judicial decisions, under a system derived from such various sources as is the law of Lower Canada.” These various sources are the French law, previous to the revolution, the English common and statute law, in reference to some subjects, and the provincial statutes ; all of which are repeatedly brought in question, and learnedly examined and discussed in the cases before us. In regard to the forms of proceeding, in the courts of Lower Canada, the French and English systems appear to have been amalgamated. There is no distinction between law and equity ;—formal defects are not fatal, at least, we have seen no case, in which the decision turned upon a question of form ;—matters of fact are settled without a jury ;—and damages when awarded are assessed by the court or by experts appointed for the purpose. Both the student of law and the practising lawyer will find their account in an examination of Mr. Stuart's volume. The editor's notes add greatly to the value of the work. One on page 107 contains a case, originally reported by Mr. Justice Pyke (in a small volume of cases published in 1811), in which chief justice Sewell explains at considerable length, the system of pleading in

use in the Lower Canada courts. Our readers will find, under the head of British-American cases, in our last number, a digest of many of the cases in this volume. In compiling that digest, we selected from all the British-American reports, to which we could obtain access (except Stewart's admiralty decisions in Nova Scotia) and of the existence of which we had knowledge. Are there any Upper Canada or Nova Scotia reports?

7.—*Reports of Cases argued and determined in the Supreme Judicial Court of the State of Maine.* By JOHN SHEPLEY, Counselor at Law. Volume I. Maine Reports. Volume XIII. Hallowell: Glazier, Masters & Smith, 1838.

Mr. Shepley is the successor of Mr. Fairfield, in the office of reporter of the decisions of the supreme judicial court of Maine; and the volume before us, which contains the cases for the year 1836, exhibits the first fruits of his official labors.

The following extracts from his advertisement indicate Mr. Shepley's notion of the duties of a reporter, and also the manner in which he has accomplished his task, in the present volume.

"In preparing the statements of fact, the reporter has attempted, and not without much labor, to condense them into the least possible compass, consistent with a clear understanding of the case. In some few instances, additional facts would have been inserted, if they had been found in the exceptions or report.

"In framing the abstracts, he has, when practicable, given the principles decided, in preference to abridged statements of the facts followed by the conclusions drawn from them by the court. In his statements of principles, he has intended to confine himself to such as are necessarily implied in the decision of the case. He has done this from the belief, that the whole court are responsible for that alone, and that the reasonings and illustrations, as well as the whole language of the opinion, have but the authority of the judge by whom such opinion may have been drawn up."

In pursuance of a resolve of the legislature of Maine, Mr. Shepley's first volume is "entitled and lettered on the back thereof," as the thirteenth volume of Maine Reports. Our readers will find some of the principal decisions in this volume inserted in the digest of American cases contained in the present number of our journal.

8.—*A Charge to the Grand Jury, upon the importance of maintaining the Supremacy of the Laws: with a brief Sketch of the Character of William M. Richardson, late Chief Justice of the Superior Court of New Hampshire.* By JOEL PARKER. Concord, N. H.: Marsh, Capen, & Lyon, 1838.

The disgraceful scenes, enacted within a few years, in various parts of the United States, by tumultuous assemblages of citizens, substituting their own wild passions for the deliberate action of the law, or setting their will against its provisions, have given occasion to many productions like that before us, but to few which manifest equal ability, power, and eloquence. We should be glad, if our limits would permit, to transfer some portion of this charge to our pages, or at least to give an analysis of it; but we must content ourselves with commanding it to the perusal of all the friends of law and social order. That portion of the address, in which chief justice Parker speaks of the life and character of his predecessor, the late chief justice Richardson, is republished, as an article, in our present number. It does equal justice to the character and talents of the deceased, and to the feelings and taste of the author.

9.—*Extracts from a Lecture on the Philosophy of the Law,* read before the Washington Lyceum, Dec. 2, 1837. By J. S. B. THACHER, Esq. South Western Journal, published at Natchez.

The purpose of this lecture is “to show, in unfolding the philosophy of the law, how intimately it is connected with human affairs,—with government, religion, morals, business and social life;” and, in discussing these several subjects, the writer manifests much thought and learning, accompanied by a sound practical judgment. His style is easy and flowing, and well adapted to interest and instruct an unprofessional audience. The law will be the more respected, the more popularized it becomes; and its ministers will suffer no detriment, from the mysteries of their craft being subjected to the scrutiny of the common mind.

10.—*Inaugural Addresses, delivered by the Professors of Law in the University of the city of New York, at the opening of the Law School of that Institution.* Published at the request of the Council of the University. New York : 1838.

The law school of the university of the city of New York is divided into three departments:—a department of practice and pleading; another of the law of persons and personal property including commercial law; and a third of the law of real property and of equity. The faculty consists of three professors, namely:

Benjamin F. Butler (late attorney general of the United States), professor of general law and of the law of real property, and principal of the faculty;

William Kent, professor of the law of persons and personal property; and

David Graham, Jr., professor of the law of pleading and practice.

The course of study in each department is to embrace one year, the full course three years; and, in addition to the lectures, given by the professors in their several departments, a parallel or general course is to be given to the whole school, by the principal, Mr. Butler, on the law of nature and nations, and on the jurisprudence of the United States.

Though the establishment of a law faculty formed a part of the original design of the university, and a plan for the purpose, drawn up by Mr. Butler, the principal, was adopted by the council in 1835, the complete organization of the school has been delayed until the present year, in consequence of the official engagements of that gentleman, which have hitherto prevented him from entering on the duties of his professorship. Those engagements being terminated, the law school of the university of New York was opened in April last; on which occasion, the several professors delivered the inaugural addresses, contained in the pamphlet before us. The subject of Mr. Butler's address is, "the usefulness of the legal profession; and the necessity and importance of providing additional means for instruction in legal science:"—that of Mr. Kent, "the rise and progress of commercial law in English juris-

prudence :”—and of that of Mr. Graham, “ the practice of the law, as illustrated in the study of pleading and practice.”

Our limits will not allow us to make extracts from all these discourses ; and it would be invidious, to select from any one, where all are so well worthy of attention and perusal. We sincerely hope, that the distinguished gentlemen, who constitute the law faculty of the university of the city of New York, will meet with the success, to which their eminent talents and peculiar qualifications for the duties of their several departments so justly entitle them.

11.—*Dissenting Opinion of Henry W. Collier, Chief Justice of the Supreme Court of Alabama, at June Term, 1838, in the matter of John L. Dorsey.* Published in the *Flag of the Union*, July 25, 1838.

The question, in the case, which gave rise to the dissenting opinion of chief justice Collier, was on the constitutionality of a statute of Alabama, requiring attorneys and counsellors at law to take an oath against duelling. The decision of the court, it seems, was against the validity of the statute ; but, if we gather the facts of the case rightly from the argument before us, we cannot entertain the remotest shadow of a doubt of the correctness of the opinion of the chief justice, and of the perfect constitutionality of the law.

12.—*Resolves and Private Laws of the State of Connecticut, from the year 1789 to the year 1836.* Published by authority of Resolutions of the General Assembly, passed May 1835 and 1836, under the supervision of a special committee. Two volumes, 8vo. Hartford : John B. Eldridge, 1837.

The committee, under whose supervision these volumes have been published, consisted of Messrs. R. R. Hinman, Elisha Phelps and Leman Church, who were also charged with the duty of preparing and publishing an edition of the general laws. The latter part of their duty was executed in 1835 (see Am. Jur. vol. xviii. p. 232). In the volumes before us, the various acts and re-

resolves are arranged under distinct and appropriate titles, and published in alphabetical order. The work appears to have received the careful attention of the committee. Charters of incorporation, it seems, are sometimes granted in Connecticut, in the form of resolves. Are these considered as laws? The constitution, art. 3, sect. 1, declares, that the style of the *laws*, passed by the legislature, shall be—"Be it enacted by the Senate and House of Representatives, in General Assembly convened." The form of a *Resolve* is—"Resolved by this Assembly." The state courts and authorities would probably give the effect of law to a resolve; but it might be otherwise with those of other states or of the United States. The following case, which recently occurred in Massachusetts, will show that the question is not without its importance. The legislature of that state, by a resolve of April, 1836, authorized the treasurer, with the consent of the governor, to receive any sums of money which might become payable to the commonwealth, in consequence of "the distribution of any portion of the public revenue among the several states of the union." In June following, congress passed an act, providing for the deposit of the surplus revenue, with such of the several states, as should by *law* authorize their treasurers or other competent authorities, to receive the same." The governor of Massachusetts thereupon communicated the resolve of the legislature to the secretary of the treasury of the United States, and requested to be informed, whether it would be deemed by him a sufficient warrant for paying over the state's share of the surplus. The secretary replied, that the resolve did not appear to him sufficiently extensive (not being a *law*) to meet the stipulations, contemplated in the act of congress; and this opinion was afterwards confirmed by Mr. Butler, the attorney general.

The constitution of Massachusetts provides a formula for the enactment of a law, and also speaks of resolves, as acts of legislation, which require the approval of the governor; but we do not recollect, that resolves are mentioned at all in the constitution of Connecticut; there is, consequently, stronger ground for considering a resolve of the latter state not to be a law, than for a similar decis-

ion in regard to a resolve of the former. The delay occasioned by the mistake of the legislature of Massachusetts, in passing a resolve instead of a law, for the reception of the surplus revenue, caused her a loss of the interest on the first instalment amounting to a very considerable sum.

13.—*A Penal Code prepared by the Indian Law Commissioners, and published by command of the Governor General of India in Council.* Calcutta: printed at the Bengal Military Orphan Press, by G. H. Huttmann, 1837.

The new charter of the English East India Company, which was granted in the year 1834, contained a provision for the appointment of a law commission, to revise and prepare a system of laws for the government of the British dominions in India. Commissioners were accordingly appointed, who, it seems, have commenced their labors, by the preparation of a penal code, which was reported to the governor general, Oct. 14, 1837. This project, we believe, is the second (Mr. Livingston's being the first) ever prepared officially in the English language, by persons educated in the knowledge of the English common law, and must therefore be looked upon with much interest and curiosity, by all the friends of codification in England and the United States. It is not in our power, of course, to decide whether the substantive provisions of this code are well adapted to the circumstances and situation of the people, who are to be governed by it, if it should receive the sanction of the Indian government; we shall not therefore take it upon ourselves to criticise it, as a work of legislation; but, as a literary production (if it may be so termed), and as an example of codification, we think it admirable. We hope to be able, in our next or some succeeding number, to present our readers with a more full account of this first result of the Indian Law Commission. We understand, that the merits of the report are much canvassed in India, and that the labor of the commissioners have been very severely attacked and criticised. The Hon. Thomas Babington Macaulay is chairman of the board.

14.—*Reports of Cases argued and determined in the Supreme Judicial Court of Massachusetts.* By OCTAVIUS PICKERING, Counsellor at Law. Volume XX. No. 1. Boston: Charles C. Little & James Brown, 1838.

We not long since (Am. Jur. vol. xviii, p. 529) called the attention of the profession to the delay in the publication of the decisions of the supreme judicial court of Massachusetts; and, at the same time, suggested a mode by which the inconvenience resulting therefrom might for the future be remedied. We are now happy to say, that, by an act of the last session of the legislature, which provides that the reports of the decisions of the supreme judicial court, on all questions of law argued and determined before the first day of September in each year, shall be published on or before that day,—a similar delay cannot well occur, in regard to cases decided subsequently to the passing of the law. In pursuance of the requisition of the statute, Mr. Pickering has now published the first number of his twentieth volume, which contains the cases decided at the last March term in the county of Suffolk. But as the law alluded to is silent in regard to cases decided previous to its passage, Mr. Pickering's seventeenth, eighteenth and nineteenth volumes, containing the cases from September 1835 to March 1838, are still behindhand. The sixteenth volume, which was published shortly after the remarks above referred to, brought down the series of decisions to September 1835. It is to be hoped, that as little time as possible will be permitted to elapse, before the publication of the intermitted volumes.

15.—*Manual of Political Ethics designed chiefly for the Use of Colleges and Students at Law.* Part I. By FRANCIS LIEBER. Boston: Charles C. Little and James Brown, 1838.

In our last October number, we published an article on Political Hermeneutics, which we then supposed would form one of the chapters of the present work. The author, however, has thought proper to expand that article into a work by itself, to be published hereafter, and to publish the Political Ethics, of which the volume

before us constitutes the first part, as a separate work. In this determination, we think Mr. Lieber has acted wisely. The subject of Political Hermeneutics is not necessarily a part of or peculiar to that of Political Ethics ; and its importance well entitles it to be made the subject of a separate treatise.

In the volume before us, which forms a separate whole of itself, and is for that reason called part first and not volume first, the author treats, in two books, 1, Of Ethics, general and political, and, 2, Of the State. In the latter, he considers what is the true meaning of the state, and discusses the several subjects connected therewith,—as sovereignty, government, public power, people, majority, minority, and the much vexed topic of the origin of the state. These several topics occupy the greater part of the volume, and are treated in a very original, profound, and satisfactory manner. The second part, which will be published in the beginning of the next year, will treat “of those many relations, in which a citizen finds himself called upon to act, and, for which, however important, the positive law does not or cannot furnish a sufficient rule of action.”

We intend, if possible, to present our readers with a more extended notice of this work, in our next number ; and shall content ourselves at present, with the remark, that the high expectations of it, which we expressed in our introduction to the article on Hermeneutics, have been fully realized.

16—*Institutes de l'empereur Justinien, traduites en français, avec le texte en regard ; suivies d'un choix de textes juridiques relatifs à la histoire externe du droit romain et au droit privé ante-justinien*: recueil publié par M. BLONDEAU, professeur de droit romain, et doyen de la faculté de droit de Paris. 2 vol. Paris, chez Videcoq, Fanjat et Joubert, 1837.

[From the *Revue Etrangere et Françoise*, for December, 1837.]

This book offers to the student an opportunity for learning the Roman law in its sources ; it puts before his eyes the texts which form the basis of the course professed by the author in the faculty

of law of Paris. The work deserves also to be equally appreciated by the accomplished jurisconsult. The text of the Institutes, which forms the first part of it, has been collated with the correct editions recently published by Messrs. Beck and Schrader ; and has been purified of the corrupt readings, which are to be found in the other editions, published in France for the use of students. The Latin text is explained, both by a translation executed with great care, and by notes historical, dogmatic, and philosophical. The author, however, has not thought it his duty, in this work, to set forth every thing that might appear to be necessary for a knowledge of the Roman law ; he seems to be penetrated with the truth, that it is only favoring the natural inclination to idleness of a great number of students, to put into their hands works which aim to contain the entire instructions of the professor ; and that it is altogether better to furnish them with a mere guide, which, being insufficient by itself, obliges them to follow the oral explanations of the professor. In truth, students prefer to follow the courses of those professors, who are the authors of books of the first category, and such works meet with a more ready sale than those of the second, because the student flatters himself, that by reading them he will be able to dispense with his attendance upon the lectures of the author. In the first place, however, the merit of the principal French works of this kind is very doubtful ; they do not include all the materials necessary to the study more or less profound of the Roman law ; and the expositions which they contain frequently leave much to be desired. A competent judge, Mr. Schrader, professor at Tübingen, in the introduction to his new edition of the Institutes, expresses himself thus in reference to one of them : *librum, Vinnium scilicet quamvis haud inscite reddentem, legere mox omisimus.* It is perhaps to be regretted, that the law students of Paris cannot in this imitate the proceeding of the illustrious romanist of Tübingen. Experience has shown that the reading of a work by one, who is only beginning the study of a science, is never equivalent to the oral instruction, which he receives from a course of lectures.

Finally, it very often happens, that the student satisfies himself with placing the work in his library, and puts off the reading of it to the Greek calends; and, when the time of examination comes, he is reduced to the necessity of gleaning a few superficial ideas from catechisms and rehearsals by the job [*répétitions à forfait*]<sup>1</sup>, a pernicious resource against which the friends of true study will never cease to raise their voices. The Institutes are followed by the text and a translation of the novels 118 and 127, compared with the ante-justinian law, and the ancient, intermediate, and existing French law; by a chronological table of the most interesting facts relating to the history of the Roman law; alphabetical tables of the laws, plebiscites, and senatconsults, with an indication of their dates; biographical notices of the Roman jurisconsults; a notice of the two schools, the sabinian and the proculeian; and, lastly, by an extended account of the decline of the Roman law, and of its destiny, both in the east and in the west, to the present day. In these different pieces, the author gives evidence of a profound knowledge of the Roman law; he has turned to account the labors of the German historical school. This part of the work cannot fail to be favorably received in that classic land of study.

The second volume contains several documents relative to the external history of the Roman law, such as the constitutions concerning the composition and promulgation of the Theodosian code, the *Breviarium Alarici*, the *lex Burgundionum*, and of the

<sup>1</sup> The writer of the above notice refers here to an article in a preceding number of the *Rev. Et. & Fr.*, for an explanation of the term *répétitions à forfait*, which we extract for the information of our readers.

“ To what is this deplorable state of things [the little scientific value of the dissertations prepared by the candidates for law professorships] to be attributed? It seems to us, that it is owing, in a great degree at least, to the negligence of the students, of whom a small number only attend the courses with assiduity, and to the facility which others have of preparing themselves for their examinations, in a manner in some sort mechanical, by persons who are denominated *rétiteurs*. To give an idea of the character of these *rétiteurs*,

digest and code of Justinian; together with a correct edition of the principal documents of the ante-justinianean law, namely: the fragments of the twelve tables, of the *lex papiria*, of the *lex Gallia Cisalpina*, of the *tabula Heracleensis*, of the edict of the *praetor*, of the curule *sediles*, and of that of the *prefectus urbis*; the Institutes of Gaius; the fragments of Ulpian; the *Pauli Sententiae*; other fragments of the same author, and of Modestinus, Papinian and Dositheus; the *fragmenta vaticana*; the *consultatio veteris jurisconsulti*; and the writing denominated *lex Dei*; the whole accompanied by notes.

In one word, the collection of Mr. Blondeau includes (except the digest and code of Justinian) an exact and annotated edition of all the materials, the study of which is necessary to a knowledge of the Roman law, and to which the student must resort for instruction in that law. This collection forms a complete library of Roman law, for the use of the student during his first year; he may afterwards add to it the *corpus juris*.

The work will be preceded by a preface, and followed by an appendix, by Mr. Giraud, professor of the Roman law at Aix, who, in 1835, published a new edition of the Elements of Heineccius, preceded by a very remarkable introduction. We shall give an account of these two pieces as soon as they appear.

tions, it will be sufficient to exhibit a literal copy of one of the numerous notices, affixed to the walls in the quarter of the school of law:

#### COURSE OF LAW.

“MR. MARSEILLE, advocate, preparer for examinations, continues his *répétitions*, at No. 26, Ancient Comedy street.

“The constant and invariable price, in regard to all, is 30 francs by the month, or 60 francs by the job (*à forfait*); for 100 francs, a reception is guaranteed, and the sum remains deposited, to serve for a second consignation.\* The average duration of the preparations is two months. Applications may be made every day in the week except Sunday.”

\* “Before being admitted to an examination, the pupil must place, in the hands of the secretary of the faculty, a sum of money which is not the same for all examinations. If the answers of the pupil are judged insufficient, he is obliged to pass his examination anew, and to make a second consignation.”

ED. JUR.

17.—*History of the United States, from the discovery of the American Continent.* By GEORGE BANCROFT. Volumes I and II. Third Edition. Boston: Charles C. Little and James Brown, 1838.

It does not fall within our province, to take notice of this admirable work, as a literary production, or as a book of history;—but, as a delineation of the events and institutions of the old world, out of which grew the men who colonized this country, and the institutions which they here founded;—and as a faithful exposition and an eloquent and successful defence of the government and laws of our fathers, upon the principles and model of which, at a later period, our present frame of state and federated government was founded;—we wish to recommend these volumes to the student of American law, as affording the best means of preparing himself for the studies, which are to fit him for his professional duties, and to become the chief employment of his life, whether he devote himself wholly to the forum, or mingle with the honorable functions of the lawyer, the more alluring pursuits of the statesman.

Mr. Bancroft has seized the true spirit of the legislation of our colonial ancestors, which is thus alluded to:

“On every subject but religion, the mildness of puritan legislation corresponded to the popular character of puritan doctrines. Hardly a nation of Europe has as yet made its criminal law so humane as that of early New England. A crowd of offences was at one sweep brushed from the catalogue of capital crimes. The idea was never received, that the forfeiture of life may be demanded for the protection of property; the punishment for theft, for burglary, and highway robbery, was far more mild than the penalties imposed even by modern American legislation. Of divorce I have found no example; yet a clause in one of the statutes recognises the possibility of such an event. Divorce from bed and board, the separate maintenance without the dissolution of the marriage contract,—an anomaly in protestant legislation, that punishes the innocent more than the guilty,—was utterly abhorrent from their principles. The care for posterity was every where visible. Since the sanctity of the marriage-bed is the safeguard of families, and can alone interest the father in the welfare and instruction of his offspring, its

purity was protected by the penalty of death; a penalty which was inexorably enforced against the guilty wife and her paramour. If in this respect the laws were more severe, in another they were more lenient, than modern manners approve. The girl, whom youth and affection betrayed into weakness, was censured, pitied, and forgiven; the law compelled the seducer of innocence to marry the person who had imposed every obligation by the concession of every right. The law implies an extremely pure community; in no other would it find a place in the statute-book; in no other would public opinion tolerate the rule. Yet it need not have surprised the countrymen of Raleigh, or the subjects of the grandchildren of Clarendon."

Our limits will not allow us to multiply extracts. The following description of the primary democracies of New England is as true at this moment as it was of the settlements of the colonists of Connecticut. In these institutions lies the germ of all that distinguishes our government from others, which are more or less founded in individual freedom. In them, too, and in the civil institutions, founded upon them, by the colonists, we find the type of our present form of state and federated government.

"But the political education of the people is due to the happy organization of towns, which here, as indeed throughout all New England, constituted each separate settlement a little democracy of itself. It was the natural reproduction of the system, which the instinct of humanity had imperfectly revealed to our Anglo-Saxon ancestors. In the ancient republics, citizenship had been an hereditary privilege. In Connecticut, citizenship was acquired by inhabitancy, was lost by removal. Each town-meeting was a little legislature, and all inhabitants, the affluent and the more needy, the wise and the foolish, were members with equal franchises. There the taxes of the town were discussed and levied; there the village officers were chosen; there roads were laid out, and bridges voted; there the minister was elected, the representatives to the assembly were instructed. The debate was open to all; wisdom asked no favors; the churl abated nothing of his pretensions. Whoever reads the records of these village democracies, will be perpetually coming upon some little document of political wisdom, which breathes the freshness of rural legislation, and wins a disproportioned interest, from the justice and simplicity of the times. As the progress of society required exertions

in a wider field, the public mind was quickened by associations that were blended with early history; and when Connecticut emerged from the quiet of its origin, and made its way into scenes where a new political world was to be created, the sagacity that had regulated the affairs of the village, gained admiration in the field and in council."

These two volumes are entitled a "History of the Colonization of the United States." The third volume, in the preparation of which, the author is understood to be assiduously engaged, and which will soon be published, will bring down the narrative of events to the year 1765, which is in fact the commencement of the revolution. It is but justice to the publishers to add, that these volumes are among the most correct and beautiful specimens of American typography.

18.—*Selections from the Court Reports originally published in the Boston Morning Post, from 1834 to 1837.* Arranged and revised by the REPORTER OF THE POST. Boston: Otis, Broaders & Co. 1837.

The materials, from which this little volume has been made up, were originally collected in the criminal and other courts of the city of Boston, and published from day to day, for the instruction and amusement (principally the latter) of the readers of the Boston Morning Post. But, like Goldsmith's village parson, whose exhortations were so effectual, that "fools who came to scoff remained to pray," Mr. Gill, the reporter, by a judicious selection and pruning, has metamorphosed what in its original form was little better than a medley of humorous stories, into a volume of very instructive and readable matter, quite worthy of the attention of the philanthropist, as well as interesting to the general reader.

## INTELLIGENCE AND MISCELLANY.

*Works on the Conflict of Laws.* The following translation of an original letter from that eminent French jurist, Mr. Pardessus, will be read with interest. We are indebted for it to our no less distinguished American jurist, Mr. Du Ponceau, who has obligingly permitted us to enrich our pages with it. This letter gives us the first information we have had, that Mr. Du Ponceau himself had intended to publish a work on the *Jurisprudence between States, or, the Conflict of Laws*; which, however, he relinquished as soon as he learned that the subject was in the hands of Mr. Justice Story, whose able work on the subject is now in the hands of every professional reader.

Sir,

M. le Comte de Laforest has communicated to me a letter, in which you ask for some information of the sources from which you would be able to compose a work on the *Jurisprudence between States* [*Jurisprudence entre les peuples*]; and he has made me engage to furnish you with such as I am possessed of. I embrace with great pleasure, the opportunity of obliging M. de la Forest, and of rendering a service to you.

You are correct in saying that this subject has not yet been profoundly treated; and I think that a work, in which the diversified and numerous questions that arise, should be discussed on a regular plan and system, would be a real service rendered to those persons, who do not disdain the study of jurisprudence.

I am not acquainted with any particular works in France, at least in an extended view of the subject, on the law between state

and state ; and I think I can assure you that none have been published since I have given my attention to researches in this respect. It is true (at the period when France was divided into provinces, and even into subdivisions of provinces which had their particular laws or customs, from the effect of which divisions, each was in some respects a foreign country to the others) that some authors treated of the conflict of these customs ; and their works would not be without use in the undertaking in which you are engaged.

The best of these works are the treatise of Froland concerning the nature and quality of statutes, 2 vols. in quarto, Paris, 1729 ; the work of Boulleois entitled, *De la Réalité et de la Personnalité de statuts*, 2 vols. in 4to, Paris, 1766 ; various dissertations of president Bouhier in his commentary on the customs of Burgundy ; and, lastly, a dissertation upon statutes which is in the 1st volume of the Principles of French Jurisprudence, by Prevost la Jannès, 2 vols. 12mo. Paris, 1759.

I do not know any *new* works ; and by this expression I mean any which have been published since the promulgation of the new French codes, except a work on the *droit d'aubaine* by Mr. Gaschon, 1 vol. 8vo., published at Paris, in 1818 ; but I think it will not afford you much assistance in the execution of your work.

Being engaged by the very nature of teaching in commercial law, which was entrusted to me some years since, I have been obliged to occupy myself on this subject under its relation to *commercial* law. I have made it the subject of a special title (in the 6th part of my course, 2d edition, Paris, 1822) which comprises pages 206 to 250 of the 5th volume.

I have often, while writing this part of my work, wished for time to make a particular work on precisely the same subject that you propose to discuss, because it appeared to me that in the present state of the civilised world it would be of great utility. I have even already collected some foreign works ; but it is an undertaking which I am obliged to relinquish, and I am rejoiced to learn that you intend to execute it.

The following are the titles of those works which I had procured :

Bauer (Jo. Got.) *De vero fundamento quo inter civitates nititur retorsio juris.* Lipsiæ, 1740, in 4°.

Brunnemann (Jo.) *De jure peregrinorum.* Franc. ad Oder, 1662, in 4°.

Cocceius (Henr.) *De fundatâ in territorio et plurium locorum concurrente potestate.* Vitemb. 1739, in 4°.

Elsaesser (C. F.) *De jurium statutariorum variantium retorsione tunc etiam fundatâ, si actus secundum illa exercitus non præcesserit.* Erlang. 1775, in 4°.

Hertius (Jos. Nic.) *De Collisione Legum.* Giessæ, 1688, in 4°.

Hoheisel (Pan. Frid.) *De retorsione jurium statutariorum variantium, nec æquâ nec prudente.* Halæ, 1756, in 4°.

Meier (J. Goth.) *De statutorum conflictu eorumque in exteris valore.* Giess. 1715, in 4°.

Oldenburg (Vinc.) *De retorsione jurium præcipue in causis cambialibus.* Götting. 1780, in 4°.

Rechenberg (C. O.) *Bellum legum contrâ leges, retorsione ementita metuendum.* Lipsiæ, 1740, in 4°.

Scheinmann (Dav.) *De autoritate legum civilium extra territorium legislatoris.* Tubing. 1696, in 4°.

Schidmer (Ch. Jac.) *Dissertatio &c. observationes miscellaneas de retorsione juris.* Altdorf. 1787, in 4°.

Slevogt (Jo. Ph.) *De retorsione in moratorio non competente.* Jenæ, 1717, in 4°.

Steinbach (Mich.) *De jure retorsionis.* Altona, 1696, in 4°.

Voet (Paul.) *De statutis et eorum concursu.* Bruxelles, 1715, in 8°.

Some time since I received from England (from the author) a work entitled, *The Judgment of the Court of Demarara, &c.,* to which is prefixed a treatise on the difference between personal and real statutes, &c. &c., by Henry, 8vo. London, 1823. This work will furnish you with some materials; it contains from page 214 to 250, an almost entire translation of what I have written in my course of commercial law, and much other information, which may be useful.

But, in general, the principles upon this important subject are

scattered through a great number of general works on law, of which it is impossible to make an enumeration.

This, sir, is all the information which I can offer to you. I wish I could be more useful; and if you think there is any thing more respecting which you desire to ask me, I am at your disposal. I should take the greatest pleasure in being useful to you.

Accept, sir, the assurances of my high consideration.

Your obedient servant,

**PARDESSUS.**

Paris, June 10, 1825.

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*Chancellor Desaussure.* On the 7th December last, the governor of South Carolina communicated to the general assembly the resignation of the Hon. Henry W. Desaussure, one of the chancellors of the equity court of that state, who was first appointed to office in the year 1808; and, on the same day, the following resolutions passed both branches of the general assembly, viz.:

“Resolved, That the general assembly has learnt with deep regret the circumstances of ill health which have compelled the Hon. chancellor Desaussure to resign his seat on the equity bench of this state.

Resolved, That the general assembly regards, with a due estimate of their value, his long, able, and faithful services to the people of South Carolina, in the high judicial station, which he has occupied—services which not only furnish the best memorials of his worth, but an enduring example to those who are destined to succeed him.

Resolved, That the comptroller general, in settling the accounts of judge Desaussure, be authorized and directed to pass one year's salary to the credit of judge Desaussure, over and above the amount now due to him.”

On the 13th of December, the two branches of the general assembly joined in a ballot for a chancellor in the place of Mr. Desaussure, and B. F. Dunkin was elected.

*Criminal Code of South Carolina.* Governor Butler, of South Carolina, in his message to the general assembly, at the commencement of their last session, thus alludes to the penal code of that state :

“ My predecessors have so frequently brought to the notice of the legislature the penal code, and the necessity of some revision of it, that I fear to allude to it, lest it should be regarded with its usual indifference. To one, who has not made the law his professional study, our penal code is a chaos of confusion unequal and frequently unintelligible. To overcome its inequalities, and to supply its defects, executive discretion is continually applied to, and must be exercised, or the laws not unfrequently would appear sanguinary and unjust. The prerogative of pardon is indefinite, painful, and may be very much abused. The law should describe more definitely and fully its own justice. Let me urge on the legislature the necessity of attending to this subject.”

This appeal appears to have produced no other effect, than a reference in the senate of so much of the governor’s message, as relates to the penal law, to the committee on the judiciary, who made no report thereon. In the house, the subject does not seem to have been even so much as referred to any committee.

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[From the *Sydney Gazette* of October 17, 1837.]

*Juries in New South Wales.* The jury system of New South Wales, in all its branches, works badly. The anticipated alterations in the jury system, in the new charter for the colony, will, it is hoped, be such as to set at rest all complaints on this subject ; but, as some time must necessarily elapse, before these alterations can be brought into operation, it seems advisable, that some means should be adapted to secure, or to enforce, the attendance of special jurors, whose neglect materially hinders the progress of the public business in the supreme court. To enforce the attendance of respectable gentlemen on the petit jury in criminal cases is, we apprehend, a hopeless case, so long as these juries are constituted as they now are. To show the opinion entertained on this

subject, we may be permitted to mention an anecdote sufficiently illustrative of itself. Asking one day a friend of ours, whose name figures very frequently in the list of fines, why he exhibited so much repugnance to the discharge of his duty as a juror, we received an answer sufficiently laconic: "Better," said he, "be fined five pounds, than have my pocket picked of a watch worth fifty"!

*Contracts to marry.* A law, passed at the last session of the general assembly of Ohio, provides for the abolition of imprisonment for debt, in all cases of contract or agreement, with the special and very appropriate exception of promises to marry, in which, certainly, if in any, the body of a judgment debtor ought to be taken in satisfaction.

*Law of Husband and Wife.* The following *jeu d'esprit* will, we hope, serve to amuse our readers, as well as to illustrate the legal notion of the oneness of husband and wife.

————— *Superior Court, May Term, 1837.*

THE STATE *v.* HENRY DAY.

*Semblé*, that if A kills his bride,  
Such killing is not suicide.

*Baron* and *feme* are only one,  
If any ill the wife hath done;  
If any crime the man doth do,  
*Baron* and *feme* are clearly two.

In either case, or one or two,  
The *baron* must the penance do.

'T is the hour of ten,  
And a crowd of men  
Wait at the door of the Justice Hall,  
Bailiffs and suitors and jurors and all;  
And a murmur loud  
Runs thro' that crowd,

And ev'ry man gives his neighbor a nudge,  
And all of them mutter, "here comes the judge."

The passage is clear'd,  
And the judge has appear'd,  
A mild looking man with a youthful face,  
He strides up the hall, and he takes his place ;  
With "silence" the crowded hall resounds,<sup>1</sup>  
But not another note the curious list'ner wounds.

The sheriff "Oh yes ! Oh yes !" hath bawl'd,<sup>2</sup>  
The witnesses come, and the jurors are call'd ;  
"Let the pris'ner be brought,"  
'T is done, quick as thought,  
A pale little man, with a twinkling eye,  
And an Amazon standing his shoulder by.  
"Let the charge now be read,"  
'T is done, quick as said ;  
"The jurors of this county town  
Do, thro' their foreman, Moses Brown,  
Charge and accuse, that Henry Day,  
Upon the seventh of this May,  
Not having law before his eyes  
But urg'd on to the crying evil,  
By sore seduction of the devil,  
(That hoary father of all lies),  
Did bruise, and wound, and badly beat,  
His present wife, late Julia Sweet,

<sup>1</sup> "With 'silence' the crowded hall resounds." One of our writers says, "We heard a pause." Another writes, "We looked for the echo here." It is not perhaps more Hibernian to declare, that the "crowded hall with silence resounds." In point of fact, any one who has heard the ill-timed and vociferous demands for silence, made by one of our "piny-woods" sheriffs, will readily understand that there is no Irishism at all in the expression.

<sup>2</sup> "The sheriff 'oh yes, oh yes,' hath bawl'd." In ancient times, courts were opened by a proclamation, commencing with "*Oyez!*" (hear ye !) Our sheriffs have *anglicised* it into O yes !—O no ! (know) would be a more pertinent and literal translation.

And other wrongs to his said mate,  
 All *contra pacem* of the state ;  
 This is the charge against you brought,  
 Day, is it true, or is it not ? ”

The captive spake : “ I own the strife,  
 I do n’t deny I struck my wife,  
 And for that part, where you aver,  
 The devil did my spirit stir,  
 ’T is true,—for I was mov’d by her :  
 The dying sinner’s wildest groans  
 Are music, to her gentlest tones,  
 And for her blows—alas, my bones !  
 Well, let it pass—perhaps ’t was wrong,  
 But I had borne her curses long,  
 And I am weak, and she is strong.  
 Let that too pass,—I ’ve done my best,  
 My counsel there must say the rest.”

The pris’ner ceas’d. His counsel rose,  
 He smooth’d his hair,—he blew his nose,  
 Then spake he : “ If your honor please,  
 The points that mark this case are these ;  
 This man has been from the beginning,  
 Rather more sinn’d against than sinning ;  
 ’T is hard to bear a woman’s strife,  
 E’en if that woman be your wife ;  
 ’T is hard to have a wife at all,  
 Yet not for that your grace I call ;  
 If we admit the deed was done,  
 Yet man and wife are only one,  
 And though we’ ve read of many a fool,  
 Train’d up in superstition’s school,  
 Who penance for his errors found,  
 In many a self-inflicted wound,

Yet in no court beneath the sun,  
 Hath he, for that, more penance done ;  
 Tho' we despise the stupid elf,  
 He has a right to whip himself." "  
 He ceas'd. 'T is far the safest way,  
 When one has nothing left to say.

Up rose the counsel for the state,  
 And thus kept up the sage debate :  
 " My learned brother's legal ground,  
 Is far more specious, sir, than sound,  
 'T is true, so doth the proverb run,  
 That " man and wife are only one,"  
 But 't is a fiction of the law,  
 Not meant to cover baron's flaw.  
 Suppose in matrimonial strife,  
 That A should stab and slay his wife,  
 My learned brother must agree,  
 That this is not *felo de se*.  
 The facts are own'd—the law is clear,  
 And he his punishment must bear."

Now speaks the judge in accents loud and clear,  
 Whilst not another sound disturbs the list'ning ear.  
 " I 'll not detain the jury long ;  
 The counsel is both right and wrong.  
 If any ill the wife hath done,  
 The man is fin'd—for they are one ;  
 If any crime the man doth do,  
 Still he is fin'd for they are two ;  
 The rule is hard, it is confess'd,  
 It can 't be helped—*lex ita est.*" "  
 " Let the passage be cleared."  
 The crowd disappear'd.

“ Now call me the chief of the bailiffs here :  
 Sheriff, let it be thy care,  
 That this jury do not see  
 Food or drink, 'till they agree,  
 (Wo to thee, if but one word,  
 From other lips, by them, is heard).  
 Be it thine especial charge,  
 That they go no more at large,  
 Until they notify to thee,  
 That in this matter they agree.  
 Go, if thou abuse thy power,  
 Thy fate is fix'd this very hour ! ”

Again,  
 'T is ten,  
 Once more I sought that hall,  
 The judge look'd cross—the bailiffs crabbed,  
 The clerk and sheriff almost rabid,  
 For why ? they had not slept at all :  
 And he, the chief of the bailiffs there,  
 Who had taken the jury under his care,  
 Look'd thirsty and vex'd as a wounded bear.  
 Oh, if the mother, that man that bore,  
 Had seen him there at that jury door,  
 She never had known her offspring more.

What sound comes forth from the jury room,  
 Is it a curse,  
 Or something worse,  
 Or some poor devil bewailing his doom ;  
 Or can it be the fearful cry  
 Of hungry juror's agony !  
 'T is whisper'd around,  
 That no verdict is found,  
 That the jury in vain have sought to agree,  
 That some think *her* as much to blame as he,  
 And both to blame exceedingly.

I came away,  
 Thro' that justice door,  
 I 've never seen Day,  
 From that time more ;  
 I would not be willing to say or swear,  
 That those bailiffs and jurors are not still there ;  
 But this I can tell,  
 For I know it full well,  
 That when last thro' that justice-hall I pass'd,  
 The jury their food and drink were missing,  
 While the made-up pair were feasting and kissing.<sup>1</sup>

## MORAL AND SEQUEL.

Jove laughs at lover's vows and shame,  
 And men had better do the same.<sup>2</sup>

R. M. C.  
*Savannah, Geo.*

<sup>1</sup> A friend informs me, that about six months ago he passed through one of the frontier counties of \_\_\_\_\_. While there, he strayed into the court house. A man by the name of Henry Day, was undergoing his trial for beating his wife. The prisoner admitted the fact, but alleged that it was done *se defendo*, which statement seemed to be corroborated by the appearance of the virago, who was nearly twice his size. His counsel contended that in law, man and wife were one, and that therefore he could not be convicted of whipping himself. The solicitor general replied, that he had lately seen a decision, (he could not at that moment say where), in which it was affirmed, that if a man kill his wife, it is not suicide, but murder, and he insisted on the applicability of the decision to the case at bar. The judge charged the jury, that it was unnecessary to decide that question, but that he would decide, that man and wife were only considered one in law for the benefit of the wife, and that in all other cases, they were two. He then gave the jury in charge of the bailiff, admonishing him, that they were in the habit of going out sober, and coming in drunk, and that if this jury so conducted themselves, he would sentence the bailiff, instead of the prisoner. My friend retired, but returned the next day. He found all the judicial and ministerial officers looking like cannibals, and the admonished bailiff representing a statue at the door of the jury room. The jury sent in a bailiff to say, that there was no prospect of their being able to agree. The judge replied, that they should find a verdict, if they stayed there through eternity. My friend, not having leisure to wait

quite so long, left the court house. When he last saw the high contracting parties (*l'un double*), they were engaged (maugre the frowns of court and bailiffs), in discussing together the merits of a cold fowl and a quart of beer. Their respective attitudes and countenances gave every indication, that a treaty offensive and defensive had been concluded between them. My friend is unable to inform me, whether the jury are yet in *status quo ante bellum*.

\* Chancellor Kent, in his celebrated letter to Edward Livingston, Esq., says, "I am a little skeptical as to legislation in regard to sexual matters." The chancellor would have exhibited more judgment, and done immense benefit to the present and all future generations, if he had used the influence of his great name, in recommending the punishment of death, for all persons who interfered in the quarrels of man and wife. Experience, that tutor of us all, has taught us, that judges, jurors, and other officers of the court, are the only sufferers from such accusations—*magna pars fui.*

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*Effect of the recent Pecuniary Embarrassments in the Production of Crime.* The following gratifying statement is extracted from the report of the chaplain of the Massachusetts state prison, for the year ending Oct. 31, 1837. It is worthy of preservation.

"When those commercial embarrassments, and that general disorganization in all the customary branches of business, by which our country has, for months past, been visited, commenced and spread over the length and breadth of the land, it was most seriously apprehended, that offences against the laws, and the rights of property, would be greatly multiplied,—and, that, in consequence, our penitentiary would fail to accommodate the numbers who might be sentenced, by our courts, to suffer its confinement and discipline. What may have been the results, thus far, of these embarrassments of the times, when such multitudes are thrown out of regular employment, in other parts of the country, the writer has not the means of knowing, with any good degree of certainty; but he has been most happily disappointed as to the result in this commonwealth.

"During the year, ending with September, 1836, *ninety-seven* convicts were received into the institution. During the year just closed, the number received has been *ninety-nine*, only *two* more than during the previous year. This fact is, surely, matter of con-

gratulation, when all the circumstances connected with it are duly considered; and is highly honorable to our large commercial towns, and to the whole commonwealth. Connected with this is another fact, worthy of particular notice, and of grateful recognition. Only *forty* of the ninety-nine convicts, who were received the past year, are native citizens of this commonwealth; the remaining fifty-nine being either foreigners or natives of other states of the union."

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*Copy-right.* The project for the establishment of an international copy-right, by an act of congress, for the benefit of foreign authors in this country, seems to have fallen through, at least for the present. The bill, reported in the senate, by Mr. Clay, in the winter of 1837, was referred at the last session to the committee on patents, who reported against its passage; and no further proceedings appear to have taken place in relation to it.

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*To our Readers.* In this number of our journal, we commence the publication of a series (of six or eight) original articles, on the law of contracts, by Theron Metcalf, Esq. The subject of the two succeeding numbers will be the parties to contracts, commencing with infants, which will occupy an entire article.

We have the promise of an article, on the organization of the French criminal courts, by M. Victor Foucher, the writer of the article in our present number, on private international law.

We have also the promise of an article, from the German criminalist Mittermaier, on the present state of criminal legislation in Europe.

A bibliographical account of all the American Reports is in preparation, and will be published whenever the materials at our command will enable us to complete it. Our friends in remote states will confer a favor by contributing their aid.

The conclusion, promised in our last, of the article on Mr. Justice Story's works on Equity, is unavoidably postponed until the next number.

## QUARTERLY LIST OF NEW PUBLICATIONS.

### UNITED STATES.

The Law Library, edited by *Thomas J. Wharton*, Esq., and published by John S. Littell, Philadelphia. Nos. 61, 62, 63, containing :

An Essay on Devises : By *John Joseph Powell*, Esq., Barrister at Law. With copious notes and an Appendix of Precedents ; also a Treatise on the construction of Devises. By *Thomas Jarman*, Esq. of the Middle Temple, Barrister at Law.

Manual of Political Ethics designed chiefly for the use of Colleges and Students at Law. Part I. By *Francis Lieber*. Boston : Charles C. Little and James Brown, 1838.

[See page 224.]

Reports of Cases argued and determined in the Supreme Judicial Court of Massachusetts. By *Octavius Pickering*, Counsellor at Law. Volume XX. No. 1. Boston : Charles C. Little, and James Brown, 1838.

[See page 224.]

Resolves and Private Laws of the State of Connecticut, from the year 1789, to the year 1836. Published by authority of the General Assembly. 2 vols. 8vo. Hartford : John B. Eldridge, 1837.

[See page 221.]

Inaugural Addresses, delivered by the Professors of Law in the university of the city of New York, at the opening of the Law School of that Institution. New York : 1838.

[See page 220.]

A Charge to the Grand Jury, upon the importance of maintaining the Supremacy of the Laws : with a brief sketch of the character of William M. Richardson, late chief justice of the Superior Court of New Hampshire. By *Joel Parker*. Concord, N. H. : Marsh, Capen & Lyon, 1838.

[See page 219.]

Reports of Decisions made in the Superior Courts of the Eastern District of Georgia, by Judges Berrien, T. U. P. Charlton, Wayne,

Davies, Law, Nicoll, and Robert M. Charlton ; and in the middle circuit, by Thomas U. P. Charlton. By *Robert M. Charlton*, late judge of the Superior Courts of the Eastern District. Savannah : T. Purse & Co. 1838.

[See page 213.]

A Charge to the Grand Jury of Adams County, delivered at the opening of the special term of the Criminal Court of Mississippi, on the fourth Monday of June, 1838. By *J. S. B. Thacher*, judge of that court. Natchez : 1838.

Pickering's Reports, volume V, 2d ed., with notes by *J. G. Perkins*. Boston : C. C. Little & J. Brown, 1838.

Massachusetts Reports. Volume I. Stereotype ed. with notes by *Benjamin Rand* : Same, 1838.

A Digest of the cases decided and reported in the Superior Court of the city of New York, the Vice Chancellor's Court, the Supreme Court of Judicature, &c., from 1823 to 1836 ; being a supplement to Johnson's Digest. Philadelphia : Published by E. F. Backus, 1838.

[See page 212.]

Reports of Cases argued and determined in the Supreme Court of Judicature and in the Court for the Correction of Errors of the state of New York. Vol. XVII. By *John L. Wendell*, Counselor at Law. Albany, 1838.

Reports of Cases argued and determined in the Court of Chancery of the state of New York. By *Alonzo C. Paige*. Vol. VI. New York, 1838.

Reports of Cases decided in the Supreme Court of Pennsylvania, in the Eastern District. December Term, 1837, and March Term 1838. Vol. III. By *Thomas J. Wharton*. Philadelphia : Nicklin & Johnson, 1838.

Reports of Cases adjudged in the Circuit Court of the United States, for the Third Circuit. 2d edition. Including two cases decided in the same court, and hitherto unpublished. By *John B. Wallace*. Same.

#### ENGLAND.

Principles of Conveyancing, designed for the use of students : with an introduction on the study of that branch of the law. By *Charles Watkins*. Part I, with annotations by *George Morley*, and *Richard Holmes Coote*. Part II, with annotations by *Thomas Coventry*. Eighth edition, revised and considerably enlarged. By *Henry Hopley White*, Esq. Barrister at Law. In 8vo.

[A good edition of a bad book. *Law. Mag.*]

A Practical Treatise on the Law of Non Compotes Mentis, or Persons of unsound mind. By *John Shapland Stock*, of the Middle Temple, Barrister at Law. In 8vo.

[A treatise of this kind has long been wanted, and we find every thing that can well be desired in Mr. Stock's. *Law. Mag.*]

An Epitome of the Practice of the High Court of Chancery, adapted for the instruction of the junior members of the Profession, with an Appendix of Forms of Writs, and the orders complete to 1837, &c. &c. By *William Richardson*, Solicitor. In 12mo.

A Series of Questions on the most important points connected with a legal education, principally designed for the use of students preparing for examination previously to their admission in the courts of law. By *James Calthrop Barnham*, Attorney at Law. 3d ed. with additions, in 12mo.

An Abridgment of the Law of Nisi Prius. By *P. Brady Leigh*, Esq., Barrister at Law. In 2 vols. 8vo.

Remarks and suggestions concerning the trial of Controverted Elections, &c. By *Percival Weldon Banks*, M. A., Barrister at Law.

#### IN PRESS.

An Abridgment of the Law of Nisi Prius, by *P. Brady Leigh*, Esq., Barrister at Law, in two volumes. With notes and references to the American Cases decided subsequently to those referred to in Mr. Wharton's edition of Selwyn's Nisi Prius. By *Geo. Sharswood*, Esq., of the Philadelphia Bar. Philadelphia: Nicklin & Johnson.

A Treatise on the Practice of the Court of Chancery. With an Appendix of Forms and Precedents of Costs, adapted to the last new orders. By *John Sidney Smith*, of the six Clerks' office. First American from the second London edition, revised and enlarged; with notes and references to American decisions, by *David Graham*, Counsellor at Law. Same.

Commentaries on Equity Jurisprudence. By *Joseph Story*. In two volumes, 2d edition. Boston: C. C. Little & James Brown.

Chitty on Contracts, from the last English edition, with notes of American Cases by *J. C. Perkins*. Springfield: G. & C. Meriam.

Civil Code of the State of Louisiana. E. Johns & Co. New Orleans.

[This edition is in French and English, on opposite pages, and will contain references, under each article, to other codes, treatises, and reported cases. The specimen sheet announces a handsome typography, and a volume of a

more convenient size for use than the first edition of the code. The legislature of Louisiana, at its last session, authorized the governor to purchase one thousand copies of this edition, at a price not exceeding ten dollars per copy, provided he should be satisfied with the execution of the work.]

A Digest of Cases determined in the Admiralty Courts of the United States and in the High Court of Admiralty in England; together with the substance of some of the works of Sir Leoline Jenkins, Judge of the Admiralty in the reign of Charles II. In one volume octavo, pages 450—500, with a copious index. By *George T. Curtis*, of the Suffolk Bar. Charles C. Little & James Brown: Boston.

[We have seen a few sheets of the above digest, and judging from them, we do not hesitate to pronounce it a work of the highest merit. The points are stated with great neatness and precision, all useless repetitions are avoided, and every page gives evidence of careful preparation on the part of the compiler. Digests, as every lawyer knows, are of various degrees of merit, and this one, we will venture to predict, will be entitled to take its place among those of the first order of excellence.]

#### IN PREPARATION.

A Digest of the Massachusetts Reports, comprising the seventeen volumes known as Massachusetts Reports, and the first sixteen volumes of Pickering's Reports. 1 Vol. 8vo. By *J. C. Perkins* and *J. H. Ward*, Esqrs.

Commentaries on Commercial and Maritime Jurisprudence, as administered in England and America, with occasional illustrations from the civil and foreign law. Vol. I. Agency and Partnership. By *Joseph Story*, LL.D.

A Digest or Abridgment of the American Law of Real Property. Vol. II. By *Francis Hilliard*, Counsellor at Law.

A manual of Political Ethics. Part II. By *Francis Lieber*.

Political and Legal Hermeneutics, or Principles of interpretation and construction of Political and Legal language, with observations on the value of Precedents and authorities. By the same.

Messrs. James Munroe & Co. of Boston have issued proposals for the publication of a volume of the opinions of the late chief justice Marshall on constitutional questions, compiled, we understand, by a gentleman of Cincinnati. The project is highly recommended, and portions of the work which have been examined, are well spoken of, by several gentlemen of great professional eminence.

# AMERICAN JURIST.

NO. XL.

—  
JANUARY, 1839.  
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## ART. I.—LAW OF CONTRACTS.

### No. 2.—*Of the Parties.*

MUTUAL assent presupposes parties capable of assenting. Capacity to contract is of two kinds—natural and legal—and these must, in general, concur in both parties. By natural capacity is meant a competent measure of mental power. Legal capacity includes natural, and also the permission of the law to exercise it.

In this and the next article, we shall consider the subject of the parties to contracts, under the several divisions of, 1, infants; 2, *non compotes mentis*; 3, drunkards; 4, married women; 5, outlaws and persons attainted; 6, persons excommunicated; 7, aliens; 8, spendthrifts; 9, slaves; 10, seamen; 11, agents and attorneys; 12, partners; 13, executors and administrators; 14, guardians; and, 15, corporations.

This article will be devoted to the subject of contracts, as affected by the infancy of the parties, or one of them.

## 1. INFANTS.

Infants are incapable of making contracts; and their incapacity is partly natural and partly legal. In deciding on their agreements, the actual state of their capacities is not considered.

By the common law, every person is, technically, an infant, until he is twenty one years old; and, in legal presumption, is not of sufficient discretion to contract an obligation at an earlier age.<sup>1</sup>

As some acquire maturity of judgment much sooner than others, it is obviously impossible to determine by any universal rule, how long young persons remain incapable of making a binding contract; and it is, therefore, as Puffendorf remarks, a plain direction of natural law, that this subject should be regulated by the positive institutions of society. Accordingly, we find that almost all states have fixed a period, at which legal capacity commences—and this, earlier or later, according to the character of the people, and the nature of the business to be transacted.

By the Roman law, full age, in matters of contract, is twenty five years; and such is the law, at present, in most of the countries on the continent of Europe.<sup>2</sup> The ancient Germans fixed the period of mature age principally with reference to the state of the body—especially its fitness for military service. In process of time, a certain number of years

<sup>1</sup> Co. Litt. 171, b.

<sup>2</sup> In France, by the civil code, twenty one years is the age of majority. By the same code, art. 487, "Every emancipated minor, who actually carries on trade and commerce, is reputed of full age, with respect to all acts relating to such trade or commerce." By the commercial code, art. 2, such minor must be authorized by his father or mother, or by a deliberation of the family council, in case of the death, &c. of the father, or in default of both father and mother, which deliberation must be confirmed by the civil tribunal; and this authorization must be recorded in the registry, and posted up in the hall of the commercial tribunal of the place, where the minor intends to reside.

was, by divers special laws, made the standard of maturity for various purposes, until at length the age of twenty one became, generally, “*matura Germanorum ætas*.<sup>1</sup>” At this time, however, the rule of the Roman law is believed to be the rule of most if not all the sovereignties that exist in ancient Germania.

Some writers suppose the period of twenty one years was adopted by the common law from the old Saxon constitutions on the continent, which held youth under tutelage till that age, and then allowed them to be “*sui juris*.<sup>2</sup>” Others resort for its origin to the tenure by knight-service, and the incident of that tenure, called guardianship in chivalry. Under this system, the tenant, when twenty one years old, was regarded as capable of attending his lord in war, and was therefore no longer in ward. There is in the books much learned discussion of the origin of the incidents of the tenure by knight-service, as recognized in the ancient English law. While some writers derive them from the great feudal system of the continent, others ascribe them to the encroachments of the Norman conqueror and his successors.<sup>3</sup> Mr. Hallam, in his *View of the Middle Ages*, accuses the English lawyers of an imperfect acquaintance with the history of feuds on the continent, and denies that wardship, &c., formed any part of the continental system, or sprang from the relation between lord and vassal, as it existed under that system. However this may be, it is very evident, that the period of full age, in our law, like many other important parts of our legal system, is of German origin.

As the common law generally makes no fractions of a day, a person is of full age on the day preceding his twenty first birth day.<sup>4</sup> Thus, “it has been adjudged, that if one be born the first of February, at eleven at night, and the

<sup>1</sup> Putter: *El. Jur. Germ. Priv. Hod.* § 198 & nota.

<sup>2</sup> See Mr. Butler's note to *Co. Litt.* 191; *2 Black. Comm.* c. 5; *Sullivan's Lectures*, xi. & xii.

<sup>3</sup> 1 Woodeson, 398.

last of January, in the twenty first year of his age, at one of the clock in the morning, he makes his will of land and dies, 'tis a good will, for he was then of age.'<sup>1</sup> This decision was for the benefit of the testator, enabling him to do an act, that required full age, before all the hours of twenty one years had elapsed. But the same rule would doubtless be applied against a defendant, who should attempt to avoid, on the ground of infancy, a contract made by him on the day before the twenty first anniversary of his birth.

Infancy is a personal privilege, allowed for protection against imposition; and, in general, no person but the infant himself, or his heirs or legal representatives, can take advantage of it.<sup>2</sup> Therefore, a person of full age, who makes a contract with an infant, is held to his engagement, if otherwise valid, and if the infant elects to adhere to it, though the latter may, on his part, avoid it.<sup>3</sup> Thus, an infant maintained an action against an adult for breach of a promise of marriage, although it was contended, that, as the plaintiff was not bound, there was no reciprocity.<sup>4</sup> So, a third person,—not a party to the contract,—cannot take advantage of the infancy of one of the parties. Thus, in an action for seducing a servant from his master's service, the defendant cannot resist the action, by showing that the servant was an infant, and therefore not by law bound to per-

<sup>1</sup> 1 Salkeld, 44; 2 Ib. 625; 1 Ld. Raym. 480; 2 Ib. 1096; 3 Wilson, 274; 2 Mod. 281; 6 Mod. 260.

<sup>2</sup> 1 Shower, 171; 2 Johns. 279; 5 Ib. 160; 2 Inst. 483; 2 Const. Rep. (S. C.) 549, Rose *v.* Daniel; 3 A. K. Marsh. 281, Beeler *v.* Bullitt; 1 Mason, 71, U. States *v.* Bainbridge.

<sup>3</sup> 1 Com. on Cont. 153, and cases there cited; Bac. Abr. Infancy and Age, I. 4; 1 Sid. 41. 446. But, as the remedy is not mutual, a court of chancery will not decree specific performance at the suit of an infant. 4 Russell, 298, Flight *v.* Bolland.

<sup>4</sup> Holt *v.* Ward, 2 Strange, 937; Fitzg. 275. S. C.; 1. Salk. 24; 2 Com. on Cont. 410. See also Warwick *v.* Bruce, 2 M. & S. 205; 6 Taunton, 118, S. C. 5 Cow. 475.

form the contract made with the master for service.<sup>1</sup> On the same principle (connected with others), the acceptor of a bill of exchange, or the maker of a promissory note, cannot resist payment in a suit by an indorsee, though the indorser be an infant.<sup>2</sup>

These and similar decisions proceed on the principle—now well established—that the contracts of infants are generally voidable and not void; by which is meant, that it is at their election, and theirs only, whether they will perform their contracts; and, that on their arriving at full age, they may ratify and render them obligatory, without any new consideration to support them. Any contract, therefore, which is void, and not merely voidable at the infant's election, is not binding on the adult contractor, and may be treated as a nullity by third persons. Nor will the courts, by virtue of their equitable jurisdiction, confirm such a contract, nor prohibit the infant to avoid it.<sup>3</sup>

There is much confusion, in the older books, on the question—what acts of infants shall be regarded as void, and what only voidable.<sup>4</sup> There is one result, however, in which most of the cases agree; that whenever the act done *may be* for the infant's benefit, it shall not be considered as void, but he shall have his election, when he comes of age, to affirm or avoid it. This is perhaps the only clear and intelligible proposition, which can be extracted from the authorities; and, in some cases that may arise, even this is not of perfectly easy application.<sup>5</sup>

On this ground, an infant may purchase land; for, says

<sup>1</sup> 2 H. B. 511, *Keane v. Boycott*; 6 D. & E. 652, *Ashcroft v. Bertles*.

<sup>2</sup> 4 Esp. Rep. 187, *Taylor v. Croker*; *Lawes on Pleading* in Ass. 571, n. *Grey v. Cowper*. 4 Price, 300, *Jones v. Darch*; 15 Mass. 273, *Nightingale v. Withington*.

<sup>3</sup> 1 H. B. 75, *Saunderson v. Marr*.

<sup>4</sup> See *Perkins*, § 12 *et seq.*; *Shep. Touch.* 232; *Bac. Abr. Infancy and Age*, I. 3; and cases cited in *Zouch v. Parsons*, 3 Bur. 1794.

<sup>5</sup> See 3 Bur. 1808; 2 D. & E. 161; 14 Mass. 462; 13 Ib. 239; 3 Wend. 479.

lord Coke, "it is intended for his benefit, and at his full age, he may either agree thereunto and perfect it, or, without any cause to be alleged, waive or disagree to the purchase."<sup>1</sup> For the same reason (among others) his feoffment, or other conveyance of land, is not void, but voidable only.<sup>2</sup> So, an infant's bond, or other specialty, is voidable only, in this country, where the distinction between a single bill and a bond with a penalty is of no practical importance—whatever the law may be in England.<sup>3</sup> An infant's bond with a penalty, and for the payment of interest, is held by the English courts to be void, on the ground that it cannot be for his benefit.<sup>4</sup> The courts in this country have not decided this point. Probably they would not regard an infant's engagement to pay interest as necessarily injurious to him. But a bond executed by him as surety would be considered void,<sup>5</sup> not being possibly for his benefit. A release by him to his guardian, as it affords more protection than a receipt, is also void.<sup>6</sup> Parker, C. J., supposes that all simple contracts made by an infant are voidable only.<sup>7</sup> But it has been decided, that his parol promise (promissory note), as surety, is void.<sup>8</sup> Eyre, C. J., says—such contracts, as the court can pronounce to be to the infant's prejudice, are merely void—those that are of an uncertain nature, as to the benefit or prejudice, are voidable only.<sup>9</sup> This doctrine

<sup>1</sup> *Co. Litt.* 2 b; 11 *Johns.* 543.

<sup>2</sup> *Perkins*, § 13; 3 *Bur.* 1805, 1808; 14 *Johns.* 126; *Doctor & Student*, 62; 5 *Yerg.* 41; 2 *Overton*, 431; 1 *New Hamp. Rep.* 72. As to an infant's conveyance by lease and release, see 3 *Bur.* 1794, *Zouch v. Parsons*; though this decision has been much quarrelled with.

<sup>3</sup> 1 *Johns. Cases*, 127, *Conroe v. Birdsall*; 11 *Serg. & Rawle*, 309; 12 *Ib.* 403; 14 *Mass.* 462.

<sup>4</sup> 8 *East*, 330, *Fisher v. Mowbray*; 3 *M. & S.* 477, *Baylis v. Dineley*.

<sup>5</sup> See 2 *Call*, 70; 3 *Desauss.* 482.

<sup>6</sup> *Fridge v. The State*, 3 *Gill & Johns.* 115.

<sup>7</sup> 14 *Mass.* 462.

<sup>8</sup> 4 *Day*, 57, *Rogers v. Hurd*; 4 *Conn. R.* 376, *Maples v. Wightman*; 11 *Serg. & R.* 305, *Curtin v. Patton*.

<sup>9</sup> 2 *H. B.* 515.

is recognized by the supreme court of Tennessee and by Story, J.,<sup>1</sup> by Hosmer, C. J.,<sup>2</sup> by chancellor Kent,<sup>3</sup> by lord Ellenborough;<sup>4</sup> and was the ground of the decisions just cited, respecting an infant's bond for payment of interest, his release, and his contracts as surety.<sup>5</sup>

An exception to the rule—that an infant's deed is voidable only, where the court cannot pronounce it to be to his prejudice—is made in the case of a power of attorney executed by him. Such an instrument is treated as utterly void. Hence any contract, made in his name and for his benefit, under an authority thus attempted to be delegated, is of no validity and may be regarded as void, not only by the other contracting party, but also by third persons;—and cannot be made valid by a subsequent ratification.<sup>6</sup> Indeed, no void contract can be ratified; there is, in legal estimation, no subject of ratification.<sup>7</sup> Yet, Duncan, J., in the case of *Curtin v. Patton*,<sup>8</sup> speaks about ratifying a void contract.

A power of attorney, to authorize another to receive seizin of land for an infant, in order to complete his title to an estate conveyed to him by feoffment, is voidable only,—it being an authority to do an act for his benefit.<sup>9</sup> And the good sense of the thing seems to be, that an authority delegated by an infant for a purpose which may be beneficial to him, or which the court cannot pronounce to be to his prejudice, should be considered as rendering the contract made, or act done, by virtue of it, as voidable only, in the

<sup>1</sup> 6 Yerg. 9; 5 Ib. 41; 1 Mason, 82.

<sup>2</sup> 6 Conn. R. 503.

<sup>3</sup> 2 Kent's Comm. 193. 1st ed.

<sup>4</sup> 3 M. & S. 481.

<sup>5</sup> Finch, (Law, 103) says, "grants of his, where himself hath benefit, are only voidable." See 2 Pennington, 1049.

<sup>6</sup> 2 Lill. Abr. 69; 4 Littell, 18; Bac. Abr. Infancy & Age, I. 3; 1 H. B. 75, Sanderson *v. Marr*; Finch's Law, 102.

<sup>7</sup> Dalison, 64, pl. 25; Cro. Eliz. 126, *Stone v. Wythipol*; Co. Litt. 295, b; 2 D. & E. 766; 4 Conn. R. 376.

<sup>8</sup> 11 Serg. & Rawle, 311.

<sup>9</sup> Bro. Abr. Faits, 31; 1 Roll. Abr. 730; 3 Bur. 1808; 1 Woodeson, 400.

same manner, as his personal acts and contracts are considered.

And it is held, that this anomaly is confined to cases of authority delegated under a sealed instrument. The old decisions are all of that kind ; and, being somewhat inconsistent with the general principles affecting infant's contracts, the doctrine is not extended to implied or oral authority. Therefore, where an adult and an infant were partners in trade, and the adult signed a promissory note in the name of the firm, for a partnership debt, it was held to be voidable only by the infant, and that he was bound by his ratification of it after he came of age.<sup>1</sup>

In any new case, that may arise, if it should be necessary to an infant's protection, that his deed or other contract should be considered void, the reason of the privilege would doubtless warrant an exception, in such case, to the general rule.<sup>2</sup>

It is said by lord Mansfield<sup>3</sup> that the privilege of avoiding their contracts is given to infants as a shield and not as a sword. Yet cases are not unfrequent, where equitable and honorable claims are resisted and avoided, on the mere legal right of the infant. Perhaps, however, this privilege is not oftener abused to purposes of injustice, than most other rules of law, which, from necessity, must be general, and cannot be made to bend to the circumstances of particular cases.

In contracts, where the infant engages to do some future act,—as to pay money, perform covenants, or fulfil any other promises, (*i. e.* in cases of *executory* contracts)—he may, in general, not only refuse to perform them during his infancy, but may disaffirm them after he comes of age, and leave the other party without remedy. Thus, he may re-

<sup>1</sup> *Whitney v. Dutch*, 14 Mass. 457.

<sup>2</sup> 3 Bur. 1807. 1808 ; *Reeve's Dom. Rel.* 250. 252,

<sup>3</sup> 3 Bur. 1802.

fuse to pay his bond or note, to perform any covenant he has made, or to fulfil any oral promise, though he has received a full consideration for such bond, covenant, or promise. If he has borrowed money, or purchased goods, and spent the one, and used or sold the other, he cannot be compelled to pay: and, if sued, whether during minority or after he is of full age, he may successfully resist, on the ground of his infancy at the time of the borrowing or the purchase; and his executor or administrator is entitled to the same defence.

When an infant has disposed of his own property, (*i. e.* in cases of *executed* contracts) he may, in general, disaffirm the contract, either during infancy, or after he comes of age.<sup>1</sup> Thus, if he lease his lands, reserving rent, he may allow the lessee to be his tenant, and may receive the rent; or he may rescind the contract, and treat the lessee as a trespasser.<sup>2</sup> So, if he make a feoffment, he may enter upon the land, disaffirm the conveyance, and revest the estate in himself, "either within age or at any time after his full age."<sup>3</sup> So, if he bargain and sell lands by deed inrolled, "he may avoid it when he will."<sup>4</sup>

These acts of disaffirmance may be done either during infancy, or after the party comes of age, as before stated.<sup>5</sup> But there are certain contracts of record, as fines, recoveries, recognizances, statutes, &c., which must, by the common law of England, be avoided during minority, or they

<sup>1</sup> Bac. Abr. Infancy and Age, I. 5; 13 Mass. 204, *Willis v. Twambly*; 6 Ib. 78; Reeve's Dom. Rel. 244, 250; 2 Kent's Comm. 194; Newland on Con. 13. 14; F. N. B. 192; Stearns on Real Actions, 185.

<sup>2</sup> Cro. Car. 303, 306, *Blunden v. Waugh*.

<sup>3</sup> Co. Litt. 247, 248. In Co. Litt. 380, b, the language is, "either within age, or at full age." See *Bingham on Infancy*, &c. 60. 62.

<sup>4</sup> 2 Inst. 673; 3 Bur. 1805.

<sup>5</sup> In *Roof v. Stafford*, 7 Cow. 179, Woodworth, J., held that an *executed* contract could not be disaffirmed during minority; but the judgment, in that case, was reversed by the court of errors. 9 Cow. 626.

will be binding forever.<sup>1</sup> This exception rests upon a reason that never operated in New England—probably in none of the United States,—and is not a part of our law, viz. : trying infancy by inspection.<sup>2</sup>

In order to avoid a feoffment made by an infant, it is required that he should enter upon the land to regain seizin. Conveyance by feoffment is not practised here, and is in a great measure if not wholly superseded, in England, by other modes of transferring real property.

Where the conveyance of an infant's land is by deed of bargain and sale—the common mode of assurance in New England, and most of the other states—it is not always necessary that an entry should be made in order to avoid it. An act of the same description and notoriety as the original conveyance is sufficient to disaffirm it, and to transfer the title to a second purchaser. This indeed is the principle of the doctrine in the case of feoffments. The livery of seizin is an open, public act, and an open entry to avoid it was deemed indispensable.<sup>3</sup>

In *Jackson v. Carpenter*,<sup>4</sup> and *Jackson v. Burchin*,<sup>5</sup> where an infant had sold and conveyed wild lands by deed of bargain and sale, and, several years after he came of age, conveyed, by a similar deed, the same lands to another person ; it was held, that the first conveyance was legally avoided, and the last purchaser entitled to the property.<sup>6</sup>

Chief justice Parker supposes an infant grantor can disaffirm his deed only by entry ; and that a second conveyance before entry would not be good, as the grantor would not be seized.<sup>7</sup> This is a mere dictum, and probably made

<sup>1</sup> 2 Inst. 483 ; Co. Litt. 380, b. ; Bac. Abr. Infancy and Age, I. 5.

<sup>2</sup> See 3 Black. Comm. 331. 332. <sup>3</sup> Stearns on Real Actions, 186.

<sup>4</sup> 11 Johns. 539.

<sup>5</sup> 14 Johns. 124.

<sup>6</sup> The ownership of wild land is held to be equivalent to livery of seizin. 14 Johns. 106 ; Stearns on Real Actions, 33.

<sup>7</sup> 13 Mass. 375. See *McGill v. Woodward*, 1 Const. Rep. (S. C.) 468.

with reference only to lands that are in possession of the grantee.<sup>1</sup>

If a grantor or lessor would merely disaffirm his grant or lease, on the ground of infancy, without transferring the land to a third party, he must, probably, make an entry, in order to revest himself or gain possession; or do some other act of notoriety equivalent to the grant or lease.<sup>2</sup>

As no deed is necessary to the transfer of personal property, an infant's contract respecting the disposition of such property may be disaffirmed by his verbal declarations to the other party, and by retaking or demanding the restoration of it. And this he may do, although the contract was made with the express approbation of his guardian.<sup>3</sup>

The effect of the disaffirmance of an infant's contract, upon the rights and interest of the other party, is very different in the cases of executory and of executed agreements.

Where the agreement is executory on the part of the adult, a disaffirmance by the infant discharges the adult from his obligation to performance. As if an infant leases land, reserving rent payable *in futuro*, and afterwards avoids the lease, the lessee is not bound by his agreement or covenant to pay the rent, at least, for no longer time than he occupies under the lease. So, if an infant sell a horse or any other chattel on credit,—taking the purchaser's oral promise, or note,—if he rescind the contract and reclaim the property, the purchaser may refuse to pay for it; and, if sued, may defend with success against the infant's claim.<sup>4</sup>

But if the contract is executed by the adult, he cannot compel the infant to restore what he has paid him. Thus, in the cases above supposed, if the rent had been paid in

<sup>1</sup> Perhaps the statute of 1783, ch. 37, § 4, (Rev. Stat. ch. 59, § 1,) may render an entry necessary in Massachusetts.

<sup>2</sup> Mr. Justice Woodbury says, an entry is generally necessary, to avoid an infant's grant of land; 1 New Hamp. R. 75, Roberts *v.* Wiggin.

<sup>3</sup> 10 Johns. 132.

<sup>4</sup> Reeye's Dom. Rel. 243. 244,

advance, or the horse or other property been paid for before delivery, the law would give no redress, though the infant disaffirmed the lease, or refused to deliver the property sold by him; that is, no redress in an action on a contract. And it is by no means clear, that in such cases there is any legal remedy. We believe there is not.<sup>1</sup>

Where, however, the infant receives payment on the sale and delivery of his goods, it may admit of question, whether he can rescind the contract and reclaim possession, without refunding the price. That he may, on the mere ground of his minority, disaffirm the sale, does not admit of question; and, for causes, which it is unnecessary to state here, contracts between persons of full age may sometimes be rescinded; but, in such cases, the party rescinding must always place the other party *in statu quo*. And in one case, it is said by Mr. Justice Putnam, that this principle would be applied to an infant, who had received payment and should afterwards seek to reclaim his property.<sup>2</sup>

But where the infant refuses to pay for articles sold to him, the other party cannot retake the articles; and where he has received money for property which he engaged to deliver to the purchaser, and afterwards refuses to deliver,—his privilege (as it is termed) is his defence. This is manifestly inequitable, and Judge Reeve<sup>3</sup> therefore zealously contends that such is not the law. But the principles of the law of infancy seem to lead to this result, and the authorities to be too stubborn to be resisted.

<sup>1</sup> See 5 Serg. & Rawle, 309, *Shaw v. Boyd*, where an infant received \$500, for giving a bond to release dower, and yet recovered dower without refunding the money. See 1 Bailey, 320, *Crymes v. Day*; 2 J. J. Marsh. 361, *Jones v. Todd*.

<sup>2</sup> 15 Mass. 363. See 1 Greenl. 13, where the same doctrine is recognized; 7 Cowen, 183, where Mr. Justice Woodworth says: "the better opinion is, that the disaffirmance of the sale of an infant vendor entitles the vendee to sue for the consideration;" and, 13 Mass. 204, where an infant, on rescinding a bargain, did return the property he had received.

<sup>3</sup> Domestic Relations, 244.

Nor is there any thing less equitable in this result of legal principles, than in that already mentioned, which even Judge Reeve does not controvert, viz. that an infant may safely refuse to pay for articles bought, or to repay money borrowed by him. In the one case, the party loses his goods or money lent; in the other, he loses money paid by him without an equivalent.

There is some reciprocity in this rule of law, whether it be right or wrong. For if an infant has advanced money on a contract, which he afterwards disaffirms, he cannot recover the money from the adult, whether paid on a valuable consideration or on none at all.<sup>1</sup> Therefore, where an infant took a lease in March, and advanced £157, 10s., and, on coming of age in June, disaffirmed the contract and brought an action to recover of the lessor the amount of money thus paid in advance, he was nonsuited by the unanimous opinion of the court.<sup>2</sup>

An infant, however, may reclaim money paid on a consideration that has failed, and may have a remedy against those who defraud him. As to these rights, he stands upon the same ground as an adult. In addition to his power to disaffirm his contracts without cause, he has all the legal rights of a person of full age to rescind them for cause. His privilege is merely cumulative, and neither diminishes nor varies any rights to which he would be entitled without it.<sup>3</sup>

<sup>1</sup> 2 Eden, 72; Wilmot, 226, n. 8 Cow. 84; 7 Ib. 184; 5 N. Hamp. R. 343.

<sup>2</sup> Holmes v. Blogg, 8 Taunt. 35. 568; 1 Moore, 466; 2 Ib. 552. S. C. So, in Wilson v. Kease, (Peake's New Cases, 190), lord Kenyon ruled, that though an infant is not compellable to complete a contract, yet he cannot maintain an action to recover back a deposit made when the contract was entered into. But where an infant agreed to labor three years for a certain sum, and left his employer before the time expired; it was held that he might recover pay for the service performed; 2 Pick. 332, Moses v. Stevens. This last case, however, is directly impugned by the decisions in 8 Cow. 84, and 5 N. Hamp. R. 343.

<sup>3</sup> See 6 Taunton, 120.

It is true, that minors are liable, generally, for their torts, as, for slander, trespass, &c.<sup>1</sup> But in the case before mentioned, of a minor's refusing to pay for goods which he has bought, there is no principle of law by which he can be made liable, in an action *ex delicto*, or by which the vendor can rescind the sale, and retake the goods. He would be liable only on his contract, and from this liability the minor is protected by his privilege. It would be a violation of all sound principle, to regard and treat as fraudulent and tortious, in an infant, those acts which are not so in an adult, merely because the infant is not liable, like the adult, in an action *ex contractu*.

In the case, also before mentioned, of a minor's refusing to deliver goods which he has sold, and for which he has received payment, it is probably true, that if he were an adult, he might be sued in an action of trover for the unlawful detention (technically, conversion), and made to pay the full value to the purchaser. But an adult cannot avoid his fair contract, like an infant; and therefore the goods, upon his paying for them, become his (as between him and the seller), and the subsequent detention, against his will, is a conversion of *his* property. When, however, an infant avoids his contract, in such case, the property in the goods reverts to him, and, by refusing to deliver them, he cannot be said to convert the goods of the purchaser.

Though this reasoning is technical, yet it is legal, and we must defer to its results.

But if, in this case, an adult would likewise be liable in an action on the case, for tortiously refusing to deliver the goods, yet it is a settled principle, that where the substantial ground of action is a contract,—or rests on promises—the plaintiff cannot, by declaring in tort, render an infant liable, who would not have been liable on his promise.

<sup>1</sup> Noy, 129; 8 D. & E. 337; 3 Pick. 492; 6 Cranch, 226; 2 Eden, 72; 3 Wend. 391.

The first case on this point is *Grove v. Nevill*,<sup>1</sup> where it was decided, that infancy is a good defence against an action of deceit, for affirming, on the sale of goods, that they were the vendor's property, when they were, in fact, the property of another person.<sup>2</sup>

The next case is that of *Johnson v. Pie*,<sup>3</sup> where an infant was sued, in an action *ex delicto*, for deceit in affirming himself to be of age, and thereby obtaining money, on giving a mortgage as security for payment thereof, which he afterwards avoided for infancy; and judgment was arrested after verdict for the plaintiff.<sup>4</sup>

On the authority of these cases, it was held, in *Jennings v. Rundall*,<sup>5</sup> that infancy was a bar to an action *ex delicto*, in which the plaintiff declared, that he let a horse to the defendant to be moderately ridden, but that he injured the horse by immoderate riding and want of care.

In *Green v. Greenbank*,<sup>6</sup> it was decided, that an infant is not liable for a false warranty on an exchange of horses. Chief justice Gibbs, there said: "This is a case in which the assumpsit is clearly the foundation of the action; for it is in fact an undertaking that the horse was sound." And he referred to 1 Roll. Abr. 2, where it is said to have been adjudged, that an infant is not liable, on the custom of the realm, for the loss of goods committed to him as an inn-keeper; which doctrine was recognized by Lord Holt.<sup>7</sup>

Before the action of assumpsit was brought into its present

<sup>1</sup> 1 Keble, 778.

<sup>2</sup> Mr. Justice Windham doubted. In 1 Keble, 914, it is stated, that, in addition to the false affirmation as to ownership, the infant deceived the purchaser, by asserting that the article was of a different kind from what it proved to be. See *Curtin v. Patton*, 11 Serg. & Rawle, 309.

<sup>3</sup> 1 Siderfin, 258; 1 Levinz, 169; 1 Keble, 905, 913, S. C.

<sup>4</sup> This case is recognized as sound law by Mr. Justice Duncan, in 11 Serg. & Rawle, 310.

<sup>5</sup> 8 D. & E. 335.

<sup>6</sup> 2 Marsh. 485.

<sup>7</sup> *Carthew*, 161; S. P. 2 Wend 137, *Campbell v. Stakes*.

use and form, the common if not the only way of declaring, in cases like these, was in an action on the case for special damage ; and that is yet retained, and often used concurrently with the modern action of assumpsit.

In the case of *Vasse v. Smith*,<sup>1</sup> one count in the declaration alleged a consignment of flour to the defendant on commission, to be sold for cash, or drafts payable in sixty days at a specified place; and that the defendant violated his undertaking by such negligence and carelessness, that the flour was wasted and lost to the plaintiff. It was decided that infancy was a legal defence, there being no feature of a tort, for which an infant is liable, but a mere breach of contract.

So, in *Schenck v. Strong*,<sup>2</sup> infancy was held to be a good bar to an action on the case, alleging that a chair was lent to the defendant for a particular journey, to be used carefully and returned at a specified time, yet that he went with it on a different journey, carelessly broke it, and did not return it at the time agreed, thereby violating his engagement in every particular.

Had trover been brought in this case, alleging a conversion of the chair, it probably would have been sustained ; for in the case of *Homer v. Thwing*,<sup>3</sup> trover was supported against an infant who hired a horse to drive to one place, and drove it to another.

So, in *Vasse v. Smith*, above cited, a count in trover was sustained against the infant, by proof that he shipped the flour to the West Indies on account of another person. Chief justice Marshall said : "infancy is no bar to an action of trover, though the goods are possessed in virtue of a previous contract. The conversion is still in its nature a tort, for which infancy cannot afford a protection."<sup>4</sup>

<sup>1</sup> 6 Cranch, 226.

<sup>2</sup> 1 Southard, 87.

<sup>3</sup> 3 Pick. 492.

<sup>4</sup> S. P. Furnes v. Smith, 1 Roll. Abr. 530 ; Bac. Abr. Infancy and Age, E.

So, in the case of *Mills v. Graham*,<sup>1</sup> detinue was maintained against a bailee of skins, who, during infancy, took them to finish on contract and to return them to the owner, but who afterwards refused to deliver them, and "declared that he would contest the matter at law, as he was under age." Chief justice Mansfield said: "there can be no doubt that trover might have been brought on the conversion."

Thus far the English and American cases coincide. But it has been decided in South Carolina, (contrary to these principles and especially to the case of *Green v. Greenbank*) that infancy is not a defence to an action *ex delicto* for a false warranty on the sale of a horse.<sup>2</sup>

In the case of *Badger v. Phinney*,<sup>3</sup> it was held, that if an infant represent himself to be of age, and purchase goods on credit, for which he afterwards refuses to pay, on the ground of infancy;—the vendor may rescind the contract and re-take the goods from the possession of the infant, wherever he can find them.<sup>4</sup> Perhaps, mere silence, or concealment, as to his age, if the other party were ignorant respecting it, would be a sufficient legal cause for rescinding a contract made with an infant, if he afterwards refused to perform it, on account of minority.<sup>5</sup>

This, however, would often be an inadequate remedy. If the property could not be found and resumed, the adult con-

<sup>1</sup> 1 New Rep. 140.

<sup>2</sup> 1 Nott & M'Cord, 197, *Word v. Vance*. It is very clear, that infancy is a good defence to an action *ex contractu*, in such case. 4 Campb. 118, *Howlett v. Haswell*.

<sup>3</sup> 15 Mass. 364.

<sup>4</sup> The authority of this case has been recognized by the Supreme Court of Maine. 1 Greenl. 13. See also 1 New R. 140, *Mills v. Graham*.

<sup>5</sup> See 1 Sid. 129; 1 N. R. 145; *Reeve's Dom. Rel.* 247. See also a remark of Mr. Justice Le Blanc, 4 M. & S. 360,—as to a feme covert concealing her coverture—that the other party may put an end to the contract. But see 1 H. B. 75.

tractor would be remediless, unless he could maintain an action against the minor for the deceit. But no case has been found which warrants such an action. The difference in principle, between allowing the adult to rescind the contract or treat it as a nullity and retake the goods, and allowing him to maintain an action against the minor for fraud, is not very strongly marked.

Even the former course may perhaps be regarded as an innovation, warranted rather by the principles of natural justice, than the rules of legal conformity; for, it is well settled, that neither silence nor misrepresentation, respecting his age, will prevent an infant's avoiding his contract, nor render him liable in an action *ex contractu*.<sup>1</sup>

In Forrester's case,<sup>2</sup> an infant was held entitled to recover against an adult on an executory contract, where he (the infant) had not performed his part of the engagement. If, in this case, the infant had afterwards refused to fulfil his part of the contract, could the adult have recovered back the money which he had paid on judgment and execution? There is no pretence for it,—even if both parties were of full age—and yet the right of the infant to disaffirm would be no defence for the adult.<sup>3</sup>

Where a minor embezzles money, it is reported to have been held by lord Kenyon<sup>4</sup> at Nisi Prius, that he is liable in an action *ex contractu*, for money had and received; that the act being a tort, the form of action may be the same as against an adult, who may be charged in this manner, if the plaintiff chooses to waive the tort. Judge Reeve advances

<sup>1</sup> 1 Sid. 258; 3 Caines R. 323, *Van Winkle v. Ketcham*; 1 Johns. Cas. 128, *Conroe v. Birdsall*; 11 Serg. & R. 309, by Mr. Justice Duncan; 12 Ib. 403, by chief justice Tilghman, who, however, intimates that possibly there may be cases of fraud so gross as to deprive an infant of his right to avoid his agreement.

<sup>2</sup> 1 Sid. 41.

<sup>3</sup> 6 Taunt. 118; 2 Stark. Ev. 724.

<sup>4</sup> 1 Esp. R. 172.

the same doctrine.<sup>1</sup> It seems,<sup>2</sup> however, that the point was not definitively settled by lord Kenyon—a promise of payment being proved after the defendant came of age.<sup>3</sup> As this is an anomaly, wholly unnecessary to the attainment of justice, it is to be hoped that it will not be sanctioned.

Not only the infant himself, but his representatives, privies in blood, may avoid his conveyance of real property. His heir, after his death, may enter and avoid his feoffment made during minority.<sup>4</sup> On the same ground, his heir (in New York) may doubtless convey by deed, and thus avoid his former deed of bargain and sale; or he may enter and take possession, or do some other act of notoriety and disaffirmance equivalent to that of the minor's conveyance.<sup>5</sup> His executor or administrator may refuse to pay debts or fulfil other executory engagements which he contracted during infancy.<sup>6</sup> But the guardian of a minor, as such, cannot avoid his ward's contracts.<sup>7</sup>

A minor's contract cannot be ratified by him during minority in such a manner as to prevent his disaffirming it on his coming of age. Mr. Newland and some other writers suppose there is an exception to this rule, in the case of a minor's suing an adult on a contract not executed by the minor;<sup>8</sup> that otherwise there would be no consideration to support the promise of the adult; and, therefore, that the court must, in such case, consider the suit and judgment as a confirmation not to be avoided by the infant.<sup>9</sup>

If, on a minor's coming of age, he confirm or ratify a voidable agreement made during nonage, he will thereafter

<sup>1</sup> Dom. Rel. 246.

<sup>2</sup> Peake's Rep. 223.

<sup>3</sup> See also 11 Mass. 147, *Jackson v. Mayo*.

<sup>4</sup> 8 Co. 86, Whittingham's Case; *Bridgman*, 44.

<sup>5</sup> See Bac. Abr. Infancy and Age, I. 6; 11 Johns. 539; 14 Ib. 124.

<sup>6</sup> Cro. Eliz. 126; 9 Mass. 62. 100.

<sup>7</sup> 13 Mass. 240, *Oliver v. Houdlet*.

<sup>8</sup> As in *Forrester's case*, 1 Sid. 41.

<sup>9</sup> Newland on Contracts, 14. *Sed quære*. See Reeve's Dom. Rel. 249. 254.

255. 3 Bur. 1808.

be held to performance, if it be executory on his part, and cannot afterwards avoid it, if it be executed.<sup>1</sup> We have before seen, that a void agreement cannot be ratified. But a new agreement may be made, by which the party may be held to do the same thing, which he promised during infancy, or by which he may be estopped to avoid his contract made during that period. The whole binding force, however, of the obligation in such case, is in the contract made after the party is of full age.<sup>2</sup>

There is a difference in the effect of the same acts or words, when applied to an executory, and when applied to an executed or continuing contract of an infant;—the latter is held to be ratified by much slighter recognition, than is required to ratify the former.

To ratify an executory contract, as to pay money, or do other acts *in futuro*, there must be an express promise, or an explicit confirmation of a former agreement, to make the payment or do the other act; and such express promise or confirmation must be made deliberately and freely, and with a knowledge that the party is not by law liable.<sup>3</sup>

Partial payment of a debt, after the minor comes of age, is not a ratification.<sup>4</sup> “In the case of an infant,” said lord Kenyon, “I shall hold an acknowledgment not to be sufficient, and require proof of an express promise to pay, made by the infant after he has attained that age, when the law presumes that he has discretion. Payment of money, made as in the present case, is no such promise.” This was a case of an implied acknowledgment that the debt was due.

<sup>1</sup> Comb. 381, Ball *v.* Heesketh; Wilkinson on Limitations, 116.

<sup>2</sup> 3 M. & S. 477, Baylis *v.* Dineley; 4 Day, 57, Rogers *v.* Hurd.

<sup>3</sup> 1 Com. on Cont. 162 & seq.; Chitty on Cont. 35, 261; 14 Mass. 460; 4 Pick. 49; 3 Wend. 479; 1 Bailey, 28. When a ratification is relied on to support an action on an infant's voidable contract, it must be proved to have been made *before* the commencement of the suit. 1 Pick. 202; 6 N. Hamp. R. 432; 2 Barn. & Cres. 824.

<sup>4</sup> 2 Esp. Rep. 628, Thrupp *v.* Fielder.

But an express acknowledgment is not of itself a ratification. An express promise must be superadded. An acknowledgment only rebuts the presumption of payment; whereas an infant is allowed to refuse payment, though he acknowledges the debt to be due.<sup>1</sup> Thus, where the defendant, after he was of age, "said he owed the plaintiff but was unable to pay him, but that he would endeavor to get his brother to be bound with him," it was held that the contract made during minority was not ratified.<sup>2</sup> So, where a minor made a promissory note and paid a part of the sum due on it, and, on coming of age, made a will, in which he directed his just debts to be paid,—it was held not to be a ratification of the note.<sup>3</sup> So, where the same minor received money from the plaintiff, promising to pay it over to a third person, and, after he came of age, on being applied to by that person, said he should pay it to the plaintiff, when he should arrive at his residence; it was held not to be a ratification of the original promise.<sup>4</sup>

It is said by chief justice Parker,<sup>5</sup> that the terms of ratification need not import a direct promise to pay; that it is sufficient if the party explicitly agree to ratify a contract made during infancy, by language which unequivocally imports a confirmation of it; as if he say, "I do ratify and

<sup>1</sup> *Lara v. Bird*, cited in *Peake on Evid.* (2d ed.) 260; 14 Mass. 460; 1 Pick. 223.

<sup>2</sup> 1 Pick. 202, *Ford v. Phillips*.

<sup>3</sup> 9 Mass. 62, *Smith v. Mayo*. Had the note been particularly mentioned in the will, as a just debt, the decision would doubtless have been different. The decision, as made, has been questioned by the Superior Court of New Hampshire, in *Wright v. Steele*, 2 N. H. Rep. 51.

<sup>4</sup> 11 Mass. 147, *Jackson v. Mayo*. This was a case of embezzlement, where trover would have been the proper action (2 *Eden*, 72, by lord Mansfield) without any ratification.

The dictum of the court (in *Cro. Eliz.* 127,) that accepting a defeasance, after coming of age, of a bond made during infancy, is a ratification, and will hold the obligor to payment, cannot now be considered as law.

<sup>5</sup> 14 Mass. 460; 4 Pick. 49.

confirm," &c. Thus, where the party, twice before mentioned, said, after he was of age, "I have not the money now, but when I return from my voyage, I will settle with you," he was held to have expressly ratified his contract.<sup>1</sup>

So, where the maker of a promissory note, upon being called upon for payment, at full age, said the note was due, and that on his return home, he would endeavor to procure the money and send it to the promisee.<sup>2</sup> So, where a minor purchased land, for the price of which two other persons gave their note, which he promised to sign and pay after he should attain full age, and, after attaining full age, he wrote on the note, "I acknowledge myself holden as co-surety," he was charged in a suit against him on the note.<sup>3</sup>

A ratification may be conditional; but the terms of the condition must have happened, or been complied with, before an action can be sustained; as if, on coming of age, the party promise to pay a debt contracted while he was a minor, "when he is able," his ability to pay must be proved, in order to charge him;<sup>4</sup> or, if he promise to pay, if he receives a certain legacy,—or if he draws a prize in a certain lottery,—or succeeds in collecting a certain debt, &c, —he is liable when the event happens, and not before.<sup>5</sup> On the same principle, when a party binds himself by a new promise or ratification, he is liable only to the extent of his new promise; as where he promises to pay a certain part of

<sup>1</sup> 10 Mass. 137, *Martin v. Mayo*.

<sup>2</sup> 14 Mass. 457, *Whitney et al. v. Dutch et al.*

<sup>3</sup> 2 Greenl. 186, *Thompson v. Linscott*. See also 1 Pick. 221, *Barnaby v. Barnaby*.

In *Cohen v. Armstrong* (1 M. & S. 734) it was held, that a replication to a plea of infancy, that the defendant ratified the original promise, was good, after verdict, on the ground, that ratification imports a new promise, after the party comes of age. See 1 D. & E. 648, *Borthwick v. Carruthers*.

<sup>4</sup> 3 Esp. Rep. 159, *Cole v. Saxby*; 4 Pick. 48, *Thompson v. Lay*.

<sup>5</sup> 4 Pick. 49, by chief justice Parker.

the debt,—or the whole by instalments,—he is liable according to his agreement, and no further nor otherwise.<sup>1</sup>

There probably is an exception to the rule which requires an express ratification of an executory contract, in the case of a promise of marriage made during minority. As it is not necessary to prove an express original promise of this kind *in totidem verbis*; but, from the nature of the case and the state of society, it is held to be sufficient to prove the circumstances and conduct usually accompanying an intended marriage connexion, from which the promise is inferred;<sup>2</sup> so it would seem that if a minor, who was thus proved to have promised marriage, should, after coming of age, continue his addresses, and pursue the course of conduct, which usually evinces an existing engagement, he should be held to have ratified his original promise.

The promise, after full age, to perform a contract made during minority, must not only be express, but also voluntary and with a knowledge that the party is not by law liable. Thus, where the plaintiff sent a person to demand payment of a bill for goods furnished to the defendant while under age, and the person so sent threatened to arrest him; whereupon the defendant promised to give his note for the demand, but was afterwards dissuaded by a friend, lord Alvanley directed the jury, that if they believed the promise was extorted under the terror of an arrest, or that it was made in ignorance of the protection afforded to the defendant by the law, they should find a verdict for him.<sup>3</sup> And this doctrine has since been often recognized.<sup>4</sup>

Where the contract is executed on the part of the infant,

<sup>1</sup> *Green v. Parker*, cited 1 Esp. Dig. 304 [164]; *Peake's Evid.* 260, 2d ed.

<sup>2</sup> 2 *Stark. Ev.* 941; 3 *Salk.* 16, 64; 6 *Mod.* 172; 15 *Mass.* 1.

<sup>3</sup> 5 *Esp. Rep.*, 102, *Harmer v. Killing*.

<sup>4</sup> 9 *Mass.* 64; 1 *Pick.* 203. See also *Brooke v. Gally*, 2 *Atk.* 34, where chancery granted relief in a case where the party was entrapped into a ratification of a contract which originally was not perfectly fair.

or is a continuing contract in the progress of execution, slight acts of affirmance and recognition, after he comes of age, will ratify it and prevent his subsequently avoiding it; whether the contract relates to property, &c., transferred by him to another, or by another to him.

1. Where an infant has transferred property to another.

If an infant make a lease rendering rent, and accept rent after he comes of age, it is a ratification of the lease, and he cannot afterwards avoid it.<sup>1</sup> This was a case, where, after accepting rent, as just stated, the lessor ousted the lessee, and the latter supported an action of trespass against him for the interruption.

Where a minor mortgaged his land, and, on coming of age, conveyed it to another person in fee, subject to the mortgage, which he recognized in the second deed, it was held to be a ratification of the mortgage.<sup>2</sup> So, if his guardian lease his land for a term beyond his minority, and after coming of age he do any act expressive of his assent,<sup>3</sup> it is a ratification. In one case, where, on coming of age, he said to the person to whom he had previously given a lease, "God give you joy of it," it was held by Mr. Justice Mead, that he could not afterwards avoid it.<sup>4</sup>

It would seem from these authorities, that if a minor engage to labor for another beyond the time of his coming of age,—or engage to perform specified services which are unfinished when he comes of age, and he afterwards proceed in the performance, he ratifies the original contract.

<sup>1</sup> W. Jones, 157, *Ashfeild v. Ashfeild*, affirmed in the Exchequer Chamber, by all the judges, *Latch*, 199; *Godb.* 364. S. C.

<sup>2</sup> 15 Mass. 220, *Boston Bank v. Chamberlain*.

<sup>3</sup> 2 Southard, 460. S. P. 1 Atkins, 489, *Smith v. Low*.

<sup>4</sup> 4 Leonard, 4. In *Dalis.* 64, pl. 25, it was decided, that where an infant sold a term, and at full age received part of the price, he might nevertheless avoid the sale. This is not now law,—the ground of the decision being that the original contract was void, which would now be regarded as voidable, and the acceptance of part payment as a ratification.

2. Where property, &c., is transferred to an infant.

If he takes a conveyance of land during minority, and retains possession after he is of age, he ratifies the conveyance and cannot afterwards avoid it.<sup>1</sup> So, if without actual possession, he bargain and sell the same land to a stranger.<sup>2</sup> Or if he makes an exchange of land, and, after he is of age, continues in possession of the land received in exchange.<sup>3</sup> So, if he takes a lease rendering rent, and continues in the occupation of the land, after he comes of age.<sup>4</sup>

Where an award was made, on a submission by a minor's guardian, that the minor should pay his mother an annuity in lieu of dower in his estate, and he accepted the estate free of dower, and after he was of age enjoyed it thus free, he was held to have ratified the award.<sup>5</sup>

If "consentable lines" of real property are run, and agreed upon by a minor, and he acquiesces in them after he comes of age, it is a ratification of the boundaries.<sup>6</sup> If an infant makes an agreement, and receives interest under it after he comes of age, chancery will decree that he perform it.<sup>7</sup> If, after full age, he occupy and enjoy a copyhold tenement, he is liable to pay the fine due on admittance.<sup>8</sup> So, if

<sup>1</sup> 4 M'Cord, 241, *Cheshire v. Barrett*. See also 6 Greenl. 89; 2 Paige, 191.

<sup>2</sup> 1 Greenl. 11, *Hubbard v. Cummings*. The same act, we have seen, would (in New York) be a disaffirmance of a contract made by an infant.

<sup>3</sup> *Dalis*. 64; 2 Vernon, 225; *Co. Litt.* 51 b; *Sheph. Touch.* 299.

<sup>4</sup> *Cro. Jac.* 320, *Ketsey's Case*; 1 *Brownl.* 120; *S. C. 1 Rol. Abr.* 731. *S. C.* This case is cited in *Bac. Abr. Infancy and Age*, I. 8, to support the doctrine, that if rent is in arrear for several years, on a lease taken by an infant, and he continues the occupation after he arrives at majority, he ratifies the lease *ab initio*, and is chargeable with all the rent in arrear. This may be sound doctrine, but it is not warranted by this case. *Croke* and *Brownlow* both say, that the lessee was of full age before rent day came. Nor is the doctrine better supported by *Bulstrode's report of the case* (2 *Bulstrode*, 69) which will be noticed hereafter.

<sup>5</sup> 1 *Pick.* 221, *Barnaby v. Barnaby*.

<sup>6</sup> 10 *Serg. & Rawle*, 114, *Brown v. Caldwell*.

<sup>7</sup> 1 *Vernon*, 132, *Franklin v. Thornebury*.

<sup>8</sup> 3 *Bur.* 1717, *Evelyn v. Chichester*.

he make an unequal partition of lands, and, after he is of age, receive the profits of the part allotted to him, he ratifies the partition.<sup>1</sup>

It is said by Mr. Justice Yates,<sup>2</sup> that mere acquiescence, without any intermediate or continued benefit, showing assent, is not a ratification,—that some act is required to evince assent. The case then before the court was that of a conveyance of wild land, which had been previously conveyed during minority, and of which no possession had ever been taken by any person before the second sale, which was several years after the minor came of age. If the first grantee had taken possession under the infant's deed, and remained in the possession and occupation of it, until the second deed was made by the first grantor, perhaps the decision might have been different.

In the case of *Holmes v. Blogg*,<sup>3</sup> where a lease was taken by an infant and an adult, as partners, though the infant did not continue in possession after he came of age, and dissolved the partnership, yet Mr. Justice Park inclined to hold, that unless there were some act of disaffirmance, the party was bound by his original agreement; and Mr. Justice Dallas said, that "in every instance of a contract voidable only by an infant on coming of age, he is bound to give notice of disaffirmance of such contract in a reasonable time." This, however, was not the point adjudged in that case. But the principle is sustained by some recent American cases.<sup>4</sup>

In the case of *Goode v. Harrison*,<sup>5</sup> where an infant had been in partnership with an adult until within a short period of his coming of age, he was held liable for goods sold to his former partner, after he came of age, because he had not given notice of a dissolution of the partnership. This

<sup>1</sup> Litt. § 258; Co. Litt. 171.

<sup>2</sup> 11 Johns. 543.

<sup>3</sup> 8 Taunt. 35.

<sup>4</sup> See 11 Wend. 85; 1 Dana, 45; 6 Conn. R. 494; 8 Greenl. 405.

<sup>5</sup> 5 B. & A. 147.

case was not decided on grounds peculiar to infancy. Partners who retire are always liable, even after dissolution of copartnership, until notice is given. Had the goods been furnished before the minor came of age, he would not have been chargeable; his infancy would have protected him, as well after the dissolution as before. But, on coming of age, he thereafter incurred the same liabilities, and was held to the same duties, concerning the partnership, as if he had been of full age when it existed.

There are some contracts made by infants, which are excepted from the general rule. They are neither void nor voidable, but are obligatory *ab initio*, and need no ratification.

1. Where a statute authorizes an infant to make a contract for the public service, (as to enlist into the army or navy) such contract is deemed to be for his benefit, and is neither void nor voidable.<sup>1</sup>

2. Contracts of marriage, if executed, are binding, and cannot be avoided on the ground of infancy.

By the common law, the age of consent to a marriage is fourteen years in a male, and twelve in a female infant. This is called the age of discretion, but not full age.

If a boy over fourteen, and a girl over twelve years of age are married, the marriage is as valid and indissoluble, as if they were of full age. But if, at the time of marriage, either of them be under the age of discretion, such party, on arriving at that age, may disaffirm the marriage, without the interposition of any tribunal, or any process of divorce. The disaffirmance, however, cannot be made before the age of discretion.

If one of the married parties be of years of discretion, and the other not, the elder party, when the other comes to such years (and not before), may disaffirm the marriage.

<sup>1</sup> 1 Mason, 71, *U. States v. Bainbridge*. See 11 Mass. 65, 71; Cooke, 143; 4 Binn. 487; 11 S. & R. 93; 1 Ib. 353.

If, at the age of discretion, they agree to continue together, they need not, by the common law, be married again. Their continued cohabitation is a confirmation of the original contract. So, if a boy under fourteen takes a wife over twelve years of age, and sues a third person for taking her away, and "makes any continuation of the suit," after he is fourteen years old, he ratifies the marriage, and cannot afterwards avoid it. But if the wife, in such case, be under twelve years, the prosecution of the suit, after he is fourteen, would not, it seems, produce this effect; for, on her becoming twelve years old, she would have a right to disaffirm the marriage; and, by a strange anomaly, before mentioned, he would have the same right; "because," says lord Coke, "in contracts of matrimony, either both must be bound, or equal election of disagreement given to both; and so *e converso*, if the woman be of the age of consent, and the man under." Therefore, a man twenty years old may marry a girl of eleven, or a woman of twenty may marry a lad of thirteen,—they may live together a year,—and yet because the junior party at that time has the power to disaffirm the marriage, the senior shall also have the same power, although the junior may desire to ratify the connexion.<sup>1</sup>

We have before seen, that an infant's promise of marriage is voidable,<sup>2</sup> but that an adult's promise to an infant is binding; and, *a fortiori*, it would seem, that an actual marriage by an adult should be binding. If parties are by law allowed to marry before full age, good sense and good morals seem to require, that the marriage, if not wholly void for some legal defect, should be obligatory on both the parties.

3. By the custom of London, a minor may bind himself as an apprentice, and his covenants will be obligatory. Infancy is no defence to a suit against him for violation of his

<sup>1</sup> See Co. Litt. 79 & notes 44 and 45; 1 Rol. Abr. 341; Bac. Abr. Infancy and Age, A; 1 Bl. Com. 462.

<sup>2</sup> 5 Cowen, 475, Hunt *v.* Peake.

indentures.<sup>1</sup> But it is otherwise by the common law of England, and also under the statutes of Elizabeth, and the statutes of Massachusetts and New York.<sup>2</sup> Still, although he is not liable for breach of his covenants, he cannot avoid and dissolve the indentures. They are so far binding upon him, that the master may enforce his rights under them; and the legal incidents of service as an apprentice attach to the relation thus formed between the parties.<sup>3</sup> As this doctrine is adopted for the infant's benefit, on the ground, that it is for his advantage to be held to an apprenticeship, it does not apply, where his master has run away, or deserted him, so that he cannot reap the advantages of the contract.<sup>4</sup>

4. The acts of the king, whether private or official, cannot be avoided on the ground of infancy. And, in general, the acts of an infant, that do not touch his interest, but which take effect from an authority, which he is by law trusted to exercise, are binding; as if an infant executor receives and acquires debts due to the testator, or an infant officer of a corporation joins in corporate acts, or any other infant does the duties of an office which he may legally hold.<sup>5</sup>

5. By special local customs, as gavelkind, &c., infants may make binding contracts respecting their property, after they arrive at years of discretion. So, after that age, they may, by the general common law, do many binding acts, as the election of guardians, the making of a will disposing of personal property, &c.<sup>6</sup>

6. "Generally," says lord Coke, "whatsoever an infant

<sup>1</sup> 1 Mod. 271, *Horn v. Chandler*; 2 Bulstr. 192, *Burton v. Palmer*; Moore, 135, *Stanton's case*. See also 2 M. & S. 226, *Eden's case*.

<sup>2</sup> Cro. Jac. 494; Cro. Car. 179; *Hutton*, 63; 7 Mod. 15; 8 Mod. 190; 2 Mass. 228, *Blunt v. Melcher*; 8 Johns, 331, *M'Dowle's case*.

<sup>3</sup> 5 D. & R. 339; 3 B. & C. 484, S. C. See also 6 D. & E. 558, 652.

<sup>4</sup> 3 M. & S. 497.

<sup>5</sup> *Bac. Abr. Inf. & Age*, B; 3 Bur. 1802.

<sup>6</sup> 1 Hale P. C. 17; *Bac. Abr. Inf. & Age*, A. B.

is bound to do by law, the same shall bind him, albeit he doth it without suit at law";<sup>1</sup> as, if he make equal partition of lands,—or an equal assignment of dower,—or release an estate mortgaged, on payment of the sum for securing which the mortgage was given.

7. It is laid down in Comyns's Digest<sup>2</sup> and in some other compilations,<sup>3</sup> that if an infant take a lease of land, and enter upon and enjoy it, he shall be charged with the rent; and the case of *Kirton v. Elliott*<sup>4</sup> is cited in support of this position. The doctrine of that case is recognized by Mr. Justice Yates;<sup>5</sup> and lord Mansfield<sup>6</sup> enumerates payment of rent among the acts, which an infant is compellable to do; and, in another case,<sup>7</sup> he says, "if an infant takes an estate and is to pay rent for it, he shall not hold the estate, and defend against payment on the ground of infancy."

If this be law, it rests merely on authority unsupported by any analogy. There is not the slightest difference in principle, between the rent of an estate enjoyed by an infant, and any other property which he has received and used. If he have a family, the rent of a house might fairly be classed among necessaries, for which he would be liable to pay. But this does not appear to have been the ground of the decision in the case reported by Bulstrode. It is the same case, under a different name, which is found also reported by Croke<sup>8</sup> and Brownlow.<sup>9</sup> According to their reports, the question was discussed on a demurrer to the defendant's plea of infancy (which is not very intelligible), and the court held the lease not to be void, but voidable at the infant's election, and that as he came of age before rent day, he was answerable for the rent; which must have

<sup>1</sup> Co. Litt. 38, a; 172 a; 3 Bur. 1801; 6 Mass. 80; 2 Kent's Comm. 198.

<sup>2</sup> *Enfant*, C. 6.

<sup>3</sup> Bac. Abr. *Infancy & Age*, F; 1 Powell on Cont. 35; 1 Esp. Dig. 302 [162].

<sup>4</sup> 2 Bulst. 69.

<sup>5</sup> 3 Bur. 1719.

<sup>6</sup> 3 Bur. 1801.

<sup>7</sup> 2 Eden. 72.

<sup>8</sup> Cro. Jac. 320.

<sup>9</sup> 1 Brownl. 120.

been on the ground of a ratification, as we have before seen.

Bulstrode states, that the defendant demurred to the declaration, which stated that he was an infant, and that he afterwards waived his demurrer, and pleaded to issue. What the issue was, does not appear. "The case then appeared," says Bulstrode, "to be: a lease was made to an infant, rendering rent; whether he shall be charged with the payment of this rent, or not, was the question." At the end of the report, he says, "the court were all clear of opinion, that the infant lessee was liable to pay the rent." The ground of the decision does not appear. But from the whole case, taken in connexion with the other reports of it, we think it most probable, that the court considered the continuance in possession, after the lessee came of age, as a ratification, and decided the case on this point; for Mr. Justice Dodderidge is made by Bulstrode to say, "if a lease be made to husband and wife, rendering rent, the husband dies, the wife may waive this, and so avoid payment of the rent; but if she continue the possession, she shall be charged with the rent." There does not seem to be much pertinency in this illustration, unless the continued possession of the infant, after he came of age, was the ground on which he was held liable to pay the rent.

The very loose manner, in which this case is stated by all the reporters, hardly warrants its being regarded as authority for any anomalous doctrine, or for an exception to any established rule. And it is noticeable, that, in Bacon's *Abridgment*,<sup>1</sup> all the reports of this case are cited together, to support the position (among others) that at full age the lessee might have departed from his bargain, and thereby have avoided payment of the arrears, which the lessor suffered to incur during his minority.<sup>2</sup>

<sup>1</sup> *Infancy & Age*, I. 8.

<sup>2</sup> Lord Ellenborough seems to have considered the case of *Kirton v. Elliott*

8. The most important exception to the general rule is that of contracts for necessaries.

It has always been held, that an infant is bound to pay for such necessary things, as relate immediately to his person, as his meat, drink, lodgings, apparel, medical attendance, and for such instruction as may profit him in subsequent life.<sup>1</sup> He is also liable for such necessaries, if supplied to his wife and lawful children; and for the debts of his wife contracted before marriage.<sup>2</sup>

“Necessaries,” is a relative term, and not confined to such things as are positively required for mere personal support; but is to be construed with reference to the estate and degree, the rank, fortune, and age of the infant. Thus, a livery for the servant of an infant captain in the English army was considered necessary. Lord Kenyon said he could not say it was not necessary for a gentleman in the defendant’s situation to have a servant; and if it were proper for him to have one, it was equally necessary, that the servant should have a livery.<sup>3</sup> But it is otherwise, of cockades ordered for the soldiers of his company,<sup>4</sup> and of a chronometer sold to an infant lieutenant in the royal navy.<sup>5</sup> Regimentals for an infant member of a volunteer corps are necessary.<sup>6</sup>

The law distinguishes between persons, as to the fitness of necessaries, as between a nobleman’s and gentleman’s son; so also as to the time and place of education, as at

as a confirmation of the contract, by continuing in possession after the lessee came of age, 3 M. & S. 481. This discussion of an infant’s liability for rent was first published in the U. S. Law Intelligencer, vol. iii. p. 16.

<sup>1</sup> Co. Litt. 172 a; Finch, 103; Bac. Abr. Infancy & Age, I. 1; 1 Com. on Cont. 154; 2 Stark. Ev. 726, and cases there cited.

<sup>2</sup> 1 Strange, 168, *Turner v. Trisby*; Barnes, 95, *Paris v. Stroud*; Bull. N. P. 155; 1 Sid. 112; Reeve’s Dom. Rel. 234; 9 Wend. 238.

<sup>3</sup> 8 D. & E. 578, *Hands v. Slaney*.

<sup>4</sup> Ib.

<sup>5</sup> Holt’s N. P. Rep. 77, *Berolles v. Ramsay*.

<sup>6</sup> 5 Esp. Rep. 152, *Coates v. Wilson*.

school, Oxford, and the inns of court.<sup>1</sup> “Balls and serenades at night must not be accounted necessaries,” even in the case of a nobleman.<sup>2</sup> Suits of satin and velvet with gold lace were held, in the time of queen Elizabeth, not to be necessary for an infant, although he were a gentleman of the chamber to the earl of Essex. But a doublet of fustian and hose of cloth were held to be suitable to his estate and degree.<sup>3</sup>

“Horses may be very fit for an infant, as on account of his quality or constitution,” says Mr. Justice Chapple, and, if they are suitable to his condition, he is liable for the price of them, and for their keeping and medicines.<sup>4</sup>

Lord Mansfield said,<sup>5</sup> that a sum advanced for taking an infant out of jail is for necessaries; and lord Alvanley held,<sup>6</sup> that money advanced to release an infant from custody on mesne process, for a debt contracted for necessaries, or from custody on execution, where he is at all events liable to pay, is paying for necessaries. So if money be laid out for necessaries furnished to an infant, he is liable to the person thus advancing the money.<sup>7</sup> So if one, who is surety on a note, &c. given by an infant for necessaries, pay the money, the infant is liable to him in an action for reimbursement.<sup>8</sup>

If an infant lives with his parent, guardian, or other person under whose care he is placed by his parent, guardian

<sup>1</sup> Carter, 215, Rainsford *v.* Fenwick.

<sup>2</sup> By chief justice Vaughan, Carter, 216.

<sup>3</sup> Gouldab. 168, Mackerell *v.* Bachelor; Cro. Eliz. 583. S. C.

<sup>4</sup> Andr. 277, Brooks *v.* Crowse; 2 Strange, 1100. S. C. by the name of Clowes *v.* Broke; 1 Freeman, 531, Barber *v.* Vincent. In Rainwater *v.* Durham, 2 Nott & McCord, 524, three of the judges of South Carolina, against the opinion of the other two, held that a horse was not necessary for an infant, who was married and had a farm. See also 1 McCord, 572

<sup>5</sup> 2 Eden. 72.

<sup>6</sup> Clarke *v.* Leslie, 5 Esp. Rep. 28.

<sup>7</sup> 5 Mod. 368, Ellis *v.* Ellis; 1 Salk. 387, Earle *v.* Peale; 10 Mod. 67. S. C.; Godb. 219, Rearsley & Cuffer's case.

<sup>8</sup> 7 N. Hamp. R. 368.

or friend, and is properly maintained, he cannot bind himself to a stranger for necessaries. Thus, where an action was brought for ornamental clothes, sold to an infant, who lived with her mother and was decently provided for by her,—the court decided that the plaintiff could not recover; “for no man,” says Mr. Justice Gould, “shall take upon him to dictate to a parent, what clothing the child shall wear, at what time they shall be purchased, or of whom.”<sup>1</sup> And where a parent, &c., places an infant at board, or at school, as the credit is given to the parent, &c., the infant is not liable.<sup>2</sup>

Before a tradesman trusts an infant for apparent necessities, he ought to inquire whether he is provided for by his parents or friends. And he is bound to ascertain the infant's real situation in life, and not to rely on appearances. If therefore he furnish articles, which would be necessary, if the infant were not already supplied by his parents, or if, confiding in false appearances, he furnish articles too expensive or numerous for the infant's real condition, he is not entitled to recover pay for them.<sup>3</sup> But if an infant furnish a tailor with cloth for a suit of clothes, and employ him to make them, and provide the trimmings; the tailor can recover pay for his labor, &c., although the clothes are not suitable to the infant's rank and condition.<sup>4</sup>

Goods furnished to an infant trader are not necessities, although he gain his living by trade.<sup>5</sup> But for such part of

<sup>1</sup> 2 Bl. Rep. 1325, *Bainbridge v. Pickering*; S. P. 16 Mass. 31; 9 Johns. 141, *Wailing v. Toll*; 2 Paige, 419, *Kline v L'Amoureaux*; 2 McCord Ch. 16, *Edwards v. Higgins*.

<sup>2</sup> *Aleyn*, 94, *Dunscombe v. Tickridge*; *Bac. Abr. Infancy and Age*, I. 1; 1 *Com. on Cont.* 158.

<sup>3</sup> *Peake's Rep.* 229, *Ford v. Fothergill*; 1 *Esp. Rep.* 211. S. C; 2 *Paige*, 419; 6 *Simons*, 465, *Mortara v. Hall*.

<sup>4</sup> *Latch*, 157, *Delaval v. Clare*; *Noy*, 85. S. C.

<sup>5</sup> *Cro. Jac.* 494, *Whittingham v. Hill*; 2 *Strange*, 1083, *Whywall v. Champion*; 1 *Scott*, 459.

goods thus furnished, as he uses as necessaries in his family, he is liable.<sup>1</sup> Labor, &c., for an infant mechanic, on articles to be furnished to his customers, is not within the law of necessaries.<sup>2</sup>

In a case before Mr. Baron Clarke,<sup>3</sup> he ruled, that an infant was liable for the price of sheep bought to stock a farm, in which he had been set up. Such is the Scotch law, but not the law of England, nor of this country.<sup>4</sup>

In the case of *Ellis v. Ellis*,<sup>5</sup> it was decided, that money lent to an infant, for the purpose of buying necessaries, cannot be recovered of him. In this case, it appears, from some of the reports of it, that the court held, that if the money were actually expended for necessaries, the infant would be chargeable.<sup>6</sup> But the weight of authority clearly is, that an infant is not liable at law for money lent for this purpose, and actually thus appropriated. The contract arises upon the lending, and as is said by the court,<sup>7</sup> "the law knows of no contracts, but what are good or bad at the time of the contract made; and not to be one or the other according to a subsequent contingency."<sup>8</sup> The lender, however, is entitled to relief in chancery.<sup>9</sup>

Whether articles furnished to an infant are of the classes, which are necessaries suitable to his condition, is a question of law; whether they are actually necessary, and of reasonable prices, is a question of fact; "our being judges of the

<sup>1</sup> 1 Car. & Payne, 94, *Tuberville v. Whitehouse*.

<sup>2</sup> 2 Esp. Rep. 480, *Dilk v. Keighley*.

<sup>3</sup> Mentioned in Bull. N. P. 154; *Onslow's N. P.* 150.

<sup>4</sup> *Reeve's Dom. Rel.* 234; 2 *Nott & M'Cord*, 525.

<sup>5</sup> 5 Mod. 368, S. C. 12 Mod. 197; 1 *Ld. Raym.* 344; 3 *Salk.* 197.

<sup>6</sup> See also Bull. N. P. 154; 3 *Salk.* 196, 197.

<sup>7</sup> 10 Mod. 67.

<sup>8</sup> 1 *Salk.* 386, *Earle v. Peale*; *Ib.* 279, *Darby v. Boucher*; 2 *Esp. Rep.* 472, *n.*, *Proubart v. Knouth*; 1 *Com. on Cont.* 161; 1 *Selwyn's N. P.* (1st ed.) 114, 115; 1 *P. W.* 559.

<sup>9</sup> 2 *Evans's Pothier on Obl.* 26; 1 *P. W.* 558, *Marlow v. Pitfield*; *Reeve's Dom. Rel.* 230.

necessaries," say the court, in one case,<sup>1</sup> "is to the nature of the thing, not to the particulars; that indeed must be tried by the jury."<sup>2</sup>

In one case,<sup>3</sup> it is said *arguendo*, that an infant cannot, either by a parol contract, or a deed, bind himself, even for necessaries in a sum certain; for, should an infant promise to give an unreasonable price for necessaries, that would not bind him; and therefore it may be said, that the contract of an infant for necessaries, *quatenus* a contract, does not bind him; but only since an infant must live, as well as a man, the law gives a reasonable price to those who furnish him with necessaries. And such seems to be the spirit of the modern decisions.<sup>4</sup>

The infant, says chancellor Kent, cannot be precluded, by the form of the contract, from inquiring into the real value of the necessaries furnished; and is not bound to pay more than they are worth. Thus, an infant is not liable on an account stated;<sup>5</sup> nor on a bill of exchange accepted;<sup>6</sup> nor on a negotiable promissory note, given for necessaries.<sup>7</sup>

Judge Reeve<sup>8</sup> supposes, that an infant is not liable to a suit on any special contract for necessaries, where the con-

<sup>1</sup> Carter, 216.

<sup>2</sup> See as to this point, 3 Day, 37, *Stanton v. Wilson*; 1 Bibb, 519, *Beeler v. Young*; 1 McCord, 572, *Glover v. Ott*; *Comyns's Digest, Enfant*, B. 5; *Cro. Eliz.* 583. See also 1 M. & S. 738, *Maddox v. Miller*; 1 Scott, 458, *Lowe v. Griffith*.

<sup>3</sup> 10 Mod. 85.

<sup>4</sup> 2 Kent's Comm. 196; 1 Southard, 101; 2 Nott & McCord, 525; 3 New Hamp. Rep. 348; Reeve's Dom. Rel. 229; 1 Bibb, 519.

<sup>5</sup> 2 Lil. Ab. 67; *Latch*, 169, *Wood v. Whitehouse*; *Noy* 87, S. C; 1 D. & E. 40, *Trueman v. Hurst*; *Ib.* 42, n. *Bartlett v. Emery*; 2 Stark. Rep. 33, *Ingleden v. Douglass*.

<sup>6</sup> 1 Campb. 552, *Williamson v. Watts*.

<sup>7</sup> 10 Johns. 33, *Swasey v. Vanderheyden's Adm'r.*; 1 Southard 100, *Fenton v. White*; 6 Yerg. 1, *McMinn v. Richman*; 3 New Hamp. R. 348, *McCrillis v. How*. In *Derbosc v. Wheddon*, 4 M'Cord, 221, the decision is the other way; the note being in the hands of the payee. See *Bingham on Inf. &c.* 89, 90.

<sup>8</sup> Dom. Rel. 230. See also 13 Pick. 1.

tract is of such a nature, that by the rules of law as applied to adults, the consideration cannot be inquired into; as a bond, either single, or with a penalty, a negotiated bill of exchange, or promissory note, &c. Whether he be liable on a promissory note not negotiable, has not been decided. Nor is the point of much practical importance, for the payee may always join a count for goods sold, &c., and thus recover what is justly due.<sup>1</sup>

It is laid down in all the old books, that an infant is bound by his single bill given for necessaries.<sup>2</sup> Mr. Chitty doubts whether this is now law.<sup>3</sup> That instrument is almost entirely disused in England.<sup>4</sup> Besides, the consideration for which it was given was originally subject to inquiry, but was subsequently not open to discussion.<sup>5</sup> So the items of an account stated were formerly held to be conclusive on the parties. Yet, though they are, in modern times, open to correction, still an infant is held incompetent to state an account, so as to render himself liable on an *insimul computassent*.<sup>6</sup> Mr. Chitty's doubt, therefore, as to an infant's liability on a single bill, seems to be well founded. It would indeed be most extraordinary, if he should be held liable, since the law does not permit an inquiry into the consideration of the bill, while he is held not liable on an account stated, although he is allowed to investigate and contest the items which compose it.

From the analogy of an account stated, and a promissory note not negotiable given for necessaries, it would seem, that the latter cannot be the foundation of a suit against an in-

<sup>1</sup> See Kyd on Bills, 29; Chitty on Bills, 24; Bayley on Bills, 33. Kyd and Chitty differ in opinion, and Bayley expresses no opinion on the point.

<sup>2</sup> 1 Levins, 86, Russell *v.* Lee, adjudged.

<sup>3</sup> Chitty on Cont. 33.

<sup>4</sup> 1 Campb. 553, n.

<sup>5</sup> Reeve's Dom. Rel. 231. See the remarks of chief justice Kirkpatrick, 1 Southard, 101, that the ground of the action is the providing of necessaries, and not the bill.

<sup>6</sup> 1 Durnf. & East, 42.

fant. Besides, in some of the American cases just cited, where a negotiable note was held not to be recoverable, the suits were by the payee, and the consideration was as much open to inquiry, as if the notes had not been in a negotiable form. It is therefore to be inferred, that their negotiability was not the sole ground of the decisions.

An infant's penal bond, though given for necessaries, has, in England, always been held to be void.<sup>1</sup> Probably, it would be so held in this country, and form an exception to the rule which we have before stated. The value of the consideration for which it is given cannot be disputed. And, though no more than the sum mentioned in the condition could be recovered; yet even that sum may be as erroneous or extravagant, as in the case of a note or bill of exchange, or account stated.

The analogy, therefore, of a bond for necessaries, with other special promises to pay for them, seems to entitle the obligee to treat such a bond as void, and to sue on the original promise. But it is not known that this question has been raised in any of the American courts. There is no harm in treating other penal bonds of an infant as voidable only. He may avoid or pay them at his election, or make terms of payment. For necessaries he must pay, but he should not be compelled to pay too much.

T. M.

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#### ART. II.—AT WHOSE RISK A THING SOLD IS DURING THE INTERMEDIATE TIME BETWEEN THE CONTRACT AND THE DELIVERY.

[This article constitutes the fourth part of Pothier's treatise on the contract of sale, a translation of which, by one of the editors of this journal, is now in press.]

IT is a principle, established in the Title of the Digest, *de periculo et commodo rei venditæ*, (18, 6), that, as soon

<sup>1</sup> Cro. Eliz. 920, *Ayliffe v. Archdale*; Moore, 679, S. C.; Co. Litt. 172 a.

as the contract of sale is perfected, the thing sold is at the risk of the buyer, though it is not delivered to him; so, that if, during this period, it happens to perish, without the seller's fault, the seller is discharged from his obligation, while the buyer does not thereby become discharged from his, but still remains bound to pay the agreed price.

That the seller should be discharged from his obligation, when the thing sold perishes without his fault, is a consequence of another principle, that every obligation of a specific thing is extinguished, when the thing ceases to exist; *Tr. on Obl. part 3, chap. 6.* This principle results from the very nature of things; for the thing due being the subject of the obligation, it follows, that, when it ceases to exist, the obligation also ceases, since it cannot subsist without a subject.

The other branch of the rule, namely, that the obligation of the buyer remains, though that of the seller is extinguished by the extinction of the thing, seems to be attended with more difficulty. It is however true, and founded in the nature of the contract of sale. This contract belongs to the class of those, which we call *consensual*, and which are perfected by the mere consent of the contracting parties. The delivery of the thing sold is not necessary to the perfection of this contract. The obligation, which the buyer contracts to pay the price, being therefore perfect by the mere consent of the parties which intervenes, and independently of a delivery, it ought to remain, notwithstanding the thing sold ceases to exist and can no longer be delivered. It is true, that, so long as the seller is in delay to deliver the thing, he cannot demand the price of it, because he cannot be allowed to require the buyer to perform his obligation, while he is in delay to perform his own. But when the obligation of the seller is extinguished, in one of the natural manners, in which obligations are extinguished, the buyer no longer has any thing to object, in order to defend

himself against a performance of his obligation, which, having been legally contracted, continues to subsist, and cannot be extinguished, but in some one of the manners, in which obligations are extinguished.

Several moderns, who have treated of natural law, among whom are Barbeyrac, Puffendorf, &c. are of opinion, that the Roman jurisconsults have departed, in this respect, from the principles of natural law; and they maintain, on the contrary, that the thing sold is at the risk of the seller, so long as he remains the owner of it; that a loss, happening to the thing, though without his fault, ought to fall upon him, provided the buyer is not in delay to receive it; and, in like manner, that any accessions happening to the thing are for his benefit. Their arguments are, first, that it is an acknowledged maxim, even with the Roman jurisconsults themselves, that a thing is at the risk of the owner of it, *res perit domino*. The answer to this objection is, that the maxim is applicable, when the question arises between the proprietor and those who have the custody or use of the thing; in which case, the thing perishes to the loss of the owner, rather than to the loss of those who have the custody or use of it, who, by the happening of the loss without fault on their part, are discharged from their obligation to restore it. But when the question arises between the owner who is a debtor of the thing, and one who is a creditor of the same thing, and who is entitled to an action to compel a delivery of it, in such case, the thing perishes to the loss of the creditor, rather than the owner, who, by the loss, is discharged from his obligation to deliver it. In fact, each party loses the right which he has in a thing, or in relation to it, when it perishes by accident; the seller, who is the owner of the thing, loses his right of property, such as it is, that is to say, a right which he cannot retain, and which he is obliged to transfer to the buyer; the buyer, on his part, loses the right, which he has in relation to the thing, that

is to say, the right which he has to compel a delivery of it to him.

These authors object, second, that the buyer's obligation to pay the price is dependent upon the condition, that the thing shall be delivered to him. I deny the proposition. The buyer is under an obligation to pay the price, not upon condition that the seller shall give him the thing, but rather upon the condition, that the seller is on his part obliged to cause him to have the thing; it is sufficient, therefore, if the seller is legally subject to such obligation, and does not fail in its performance, in order that the obligation of the buyer may have a cause and subsist.

Though the reasons in favor of the opinion of the Roman jurists, it appears to me, ought to prevail, yet it must be acknowledged, that the question is not without difficulty, and it seems even that the Romans themselves were not unanimous in their decision of it; for, Africanus, in the law 33, *D. locat. conduct.* (19, 2, 33), says expressly, that if the treasury seizes upon an estate, which I sell you, before I deliver it, so that it is no longer in my power to deliver it, I am not indeed liable for your damages, but I am liable to restore you the price of the sale. This text appears so decisive to Cujas, that, in his treatise *ad African.* upon this law, he goes so far as to maintain, that, according to the Roman law, the thing sold is not at the risk of the buyer, contrary to the express decision of other texts of the law, to the general opinion, and even to what he has himself written, *ad l. 34, § 5, alia caus., D. de contrah. empt.* (18, 1, 34, § 5). The other interpreters imagine different modes of conciliation; the most plausible of which is that of Davesan, a professor of our university of Orleans, in his treatise *de contr.* He says, that in the case mentioned by Africanus, if the buyer is entitled to a recovery of the price, it is because the ordinances which require possessors to quit possession of their estates, on account of some public cause,

probably contain this clause, *notwithstanding all sales previously made, which are to be null*. In such case, therefore, the sale being rescinded, the buyer is entitled to recover the price; but when the thing sold perishes, the sale is not thereby rescinded. Even if we should not admit this conciliation, but suppose that Africanus was really of a different opinion from our own, his opinion, which is mentioned in the Digest incidentally and in reference to another question, ought to yield to the express decisions of other jurisconsults, in the law 7, and in the law 8, *D. de peric. et comm. rei vend.* (18, 6, 7 & 8), and to the decisions of the emperors, namely, Alexander, in the law 1, and Gordian, in the law 4, *C. dict. tit.* (4, 48, 1, § 4), and, lastly, of Justinian, who, in the Institutes, *de empt. vend.* § 3, (I, 3, 24, 3), says expressly: *Emptoris damnum est, cui necesse est, licet rem non fuerit nactus, PRETIUM SOLVERE.*

Having established the principle, that the thing sold is at the risk of the buyer, as soon as the contract is perfected, it becomes necessary to inquire when the contract receives its perfection; and, generally, the contract of sale is considered to be perfect, as soon as the parties are agreed upon the price, for which the thing is sold. This rule holds, when the sale is of a specific thing, and is absolute (*pure et simple*): *Si id, quod venierit appareat quid, quale, quantum sit, et pretium, et pure venit; perfecta est emptio*; *D. 18, 6, 8.*

If the sale is of things, which consist in *quantitate*, and which are sold by weight, number, or measure, as if one sells ten casks of the corn which is in a certain granary, ten thousand pounds of sugar, or one hundred carp, &c., the sale is not perfect until the corn is measured, the sugar weighed, or the carp counted; for, until such time, *nondum appareat quid venierit*. It does not yet appear, which is the corn, which is the sugar, or the carp, that makes the object of the sale, since that object can only be the corn that is to be

measured, the sugar that is to be weighed, or the carp that are to be counted.

It is true, that, before the measuring, weighing or counting, and at the instant of the contract, the engagements which result from it exist. The buyer is then entitled to an action against the seller, for a delivery of the thing, and the seller is entitled to an action against the buyer, for a recovery of the price, upon offering to deliver it. But, though the engagement of the seller subsists from that time, it may be truly said, that it is not yet perfect, in this respect, that as yet it is only of an object which is indeterminate, and which can be determined only by the measuring, weighing, or counting. For this reason, until the thing is measured, weighed, or counted, it does not become at the risk of the buyer; for the risk cannot fall but upon some determinate thing.

This rule holds, not only when the sale is of a certain quantity of merchandise, to be taken from a magazine which contains a larger quantity, because, in such case, as we have seen, until the measuring or weighing, that which is sold does not consist of any determinate body or thing, upon which the risk may fall; it also holds, when the sale is of the entire quantity contained in a magazine or granary, provided it is made at the rate of so much the pound, or so much the measure, &c.

The sale, in this case, is not considered as perfect, and the thing sold is not at the risk of the buyer, until it is measured or weighed; for, until that time, *non appareat quantum venierit*. The price, being constituted only for each pound, which shall be weighed, or for each cask which shall be measured, is not yet determined, before the weighing or measuring; and, consequently, the sale, before that time, is not so far perfect, that the risk of the thing may fall upon the buyer. He ought not to be charged with it, until after the goods are weighed or measured.

But if the goods are not sold by weight or measure, but *per aversionem*, that is, in bulk, and for a single and only price; in such case, the sale is perfect from the instant of the contract, and, from that time, these goods, the same as all others, are at the risk of the buyer. All these principles are drawn from the law 35, § 5, *de contrah. empt.* (D. 18, 1, 35, § 3).

The thing sold being, from the moment of the contract, at the risk of the buyer, when the sale is made *per aversionem*; and, on the contrary, remaining at the risk of the seller, when it is made by weight, or measure, until it is weighed or measured; it is important to know when the sale is considered as made *per aversionem*, and when it is considered to be made *by measure*. The following rules will enable us to determine this question.

*First rule.* There is no doubt that the sale is made *by measure*, when the price is expressly agreed upon for each measure; whether the contract imports, that it is of so many bushels of the grain, in such a granary, at the rate of so much the bushel; or of a heap of grain, which is in such a granary, and which contains a thousand bushels, at the rate of so much a bushel. All the difference is, that, in the first case, if the granary contains more than the quantity, the surplus is not sold; whereas, in the other, the entire quantity of grain is sold, though it exceeds the thousand bushels.

*Second rule.* When the sale is of so many measures of such a thing, it is considered as made *by measure*, though the terms of the contract express only a single price; as when we sell ten bushels of grain for 500 livres; the price being regarded as the total of the prices for which each bushel is sold: *Non interest unum pretium omnium centum metretarum an semel dictum sit, an rei singulos eos*; D. 18, 1, 35, § 7.

*Third rule.* When a sale is made for a single price, not of so many measures of such a thing, but of such a thing,

which is declared to contain so many measures, it is made *per aversionem*; as, where one sells, for the sum of 1000 livres, such a field, which he declares to be of the quantity of twenty acres; and consequently the thing sold, from the time of the contract, becomes at the risk of the buyer; D. 18, 6, 10, § 1. The expression of the number of acres has no other effect, in this case, than to oblige the seller to make an allowance for the defect of quantity, if the field is found to contain less, as has already been stated, *supra*, part 2.

There are certain things, which are sold subject to the condition of being tasted, as wine, oil, &c. These sales are still less perfect on the part of the buyer, until the things sold are tasted, than are sales by measure, until the things sold are measured; for, in the latter, from the moment of the contract, it no longer depends upon the buyer, that the sale does not take place. Before the goods are weighed or measured, he, as well as the seller, is bound to execute the contract, and the weighing or measuring intervenes only to fix and determine what is sold; whereas in sales made subject to the condition of tasting, the buyer may refuse to execute the bargain, if he does not find the goods to his taste: *Alia causa est degustandi, alia metiendi, gustus enim ad hoc proficit ut improbare liceat*; D. 18, 1, 34, § 5. These sales, therefore, until the tasting, are still more imperfect, than those which are made by weight or measure; and, consequently, the things sold do not become at the risk of the buyer, until he is put in delay to taste them.

According to the practice in our tribunals, different from the Roman law, it is necessary in order to put the buyer in delay, that the seller should obtain a sentence, ordering the buyer to taste the goods, previous to such a day; and, in default of which, that the bargain shall be executed absolutely.

It is to be observed, also, that we must distinguish whether the buyer stipulates that he shall taste the goods,

in order to know whether they are to his taste or not, or only to know whether they are good, lawful, merchantable, or undamaged. It is in the first case only, that he is at liberty to refuse the bargain, by declaring, after tasting the goods, that they are not to his taste; in the other, he cannot refuse the goods, provided they are found to be good.

When a sale is contracted, subject to a condition, the loss which happens by a deterioration of the thing, during the intermediate time between the contract and the existence of the condition, falls upon the buyer, if the condition happens to exist; for the seller is only bound to deliver the thing, such as it is, when the deterioration is not occasioned by his fault. But a total loss of the thing falls upon the seller; for a condition, which happens after a total loss of the thing, cannot confirm the sale of that, which is no longer in existence.

In the case of alternative sales, whether the choice be left to the seller, or be expressly accorded to the buyer, the first of the two things, which happens to perish subsequent to the contract, perishes to the loss of the seller; for that which is left remains *in obligatione*, and he is bound to deliver it. But if that which remains also perishes, it perishes to the loss of the buyer, who continues to be bound for the payment of the price, though neither of the two things remains, and can be delivered to him. See what is said of alternative obligations in the Treatise on Obligations, part 2, chap. 2, art. 6. If they both perish at the same time, the seller is in like manner discharged from his obligation, and the buyer remains the debtor of the price; D. 18, 1, 34, § 6.

L. S. C.

## ART. III.—TAXES ON LAW SUITS.

[The following article is translated from Dumont's edition of Bentham's works. It contains the views of the latter, in reference to the expense of legal proceedings, as published by him in 1792, in his *Protest against Law Taxes*.]

JUDICIAL acts have become among all modern nations a source of revenue. By means of stamp duties, they have become the object of a taxation, which has been continually on the increase, owing to the fact that it is raised without any apparent effort, and that the law which imposes it executes itself, without the possibility of evasion.

We propose examining the real nature of these taxes; on whom and under what circumstances they are levied; and their real effects on the administration of justice.

Individuals, in relation to these taxes, may be divided into two classes, those who can and those who cannot pay them. So far as the first class is concerned, it is the most burthensome kind of taxation; as to the latter, those who from poverty are unable to pay them, it operates as a complete denial of justice.

The first and radical objection to taxes on judicial process is, that they fall on the individual at the time when he is the least able to pay them. The moment one's property is unjustly taken or detained, seems the time chosen to make these extraordinary exactions. The moment a law suit commences, which arrests his exertions, which suspends his revenues, which takes from him the resources upon which he had relied, is the time selected by the guardians of innocence to extort a revenue for public purposes. All duties ought to be imposed on wealth, or at least on competence. *This is the taxation of distress.*

This is not all: there are numerous cases where these taxes are imposed on those in the extremest distress; for instance, in all cases where the aid of the law is required in the settlement of the estates of the deceased, in protecting

the rights of minors, or in disposing of the effects of the bankrupt. Even in the case of bankruptcy, the tax-gatherer purloins from the unfortunate creditor a portion of the scanty dividend which it permits him to receive from the insolvent debtor.

A tax on bread would be regarded by all as a tax of the worst kind. Yet the only result of that mode of taxation would be to diminish the bread of the poor man. In lieu of the whole, the tax deducted, he might yet have half a loaf. The poor laborer can have his half of a loaf; the poor litigant cannot have his half of a law suit. Half justice, if attainable, would be better than none; the tax is indivisible—the law inexorable in its collection. All or nothing, is its decree. You may compound with the retailer of bread. There is no composition *with the retailer of justice*.

But this is not all. Other taxes are known in advance, and provision is made to meet them. This tax is one which it is impossible, by any sagacity, to foresee; it is an unexpected charge, it is an aggravation of an accidental calamity, against which one cannot protect one's self. They tax not the hail-storm, the fire, or the shipwreck. Nevertheless this would be infinitely less absurd; since by means of insurance, for a slight premium, one might be insured against the tax. Against a law suit, nobody will insure. This tax, a misfortune so onerous to those who are able to pay it, is still worse to those who are unable. To them it amounts to a total denial of justice. Justice is the protection which the law promises for all that is valuable in our eyes; for our property, our liberty, our honor and our life. If then justice is a good which comprehends all these, the denial of justice is an evil which embraces every thing, loss of fortune, of honor, of liberty, of life; all these evils, separately or together, may result from it. To outlaw one is a measure of extreme severity. By taxes on litigation, all those are outlawed who have the greatest need and who

implore the aid of the tribunals of law. What then is the statesman thinking about, who, for mere purposes of revenue, deprives of legal protection, not the guilty, not the fugitive from justice, but the innocent, those who are not even suspected of crime, and solely because they are too poor to pay the price without which justice refuses her aid. How absurd! how illogical! The legislator, in the establishment of his laws, protects all interests equally; he wills that all rights should be respected; that every species of property should be sacred; he covers with the same ægis of the law the cottage of the poor man and the palace of the rich; he creates judges and invests them with the highest honors, to the end that they may be impartial arbiters for all the conditions of social life; he opens the sanctuary of justice to all without distinction; and, by this equality before the law, he affords a consolation for and protection against the necessary inequalities of rank and fortune.

The same legislator, by the establishment of taxes, and to obtain a contemptible sum of money, contradicts his own plan, gives the lie to his own promises, renders the tribunals of justice inaccessible to those who are unable to pay the entry fee, and sanctions an odious privilege in favor of wealth, and against weakness and poverty.

To suppose in those who make laws an intention to produce such results, would be to calumniate them. This evil is done without reflection, as it is without remorse. The rich, in addition to law, have many other means of sheltering themselves from injury; they have the natural influence of wealth; the influence of their social rank, of their situation; the power attached to innumerable connexions; superiority of intelligence and education. All these advantages they have as peculiar to themselves; but the poor has but one anchor of safety—the protection of the law—and of this he is deprived by the act of the legislator.

There is yet a third class upon whom these taxes bear  
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still more heavily. I mean those, who, having been able to bear the expenses of the commencement of a law suit, and during a part of its progress, find themselves compelled to abandon their cause from inability any further to prolong their sacrifices. This is more frequent, according to the complexity of the suit—the unexpected turns it may take—and as the system of procedure offers more or less inducement to chicanery, delay, and judicial vexations.

Cases of this nature are the more revolting as justice seems to have ensnared the poor litigant. She welcomed him as long as he afforded food to her fee-gathering avidity. She repulses him, when the skeleton, who is leaving her hands, has lost all his substance.

The partisans of these taxes offer two reasons, which they regard as fully sufficient to justify them. “The expenses of the judicial establishment ought to be borne by those who reap the benefit of it. Those members of society who have been re-established or supported in their legal rights by the courts, when they were infringed upon, ought obviously to pay for this service.”

The general principle advanced cannot be denied, but it has no application to the case under consideration. The due administration of justice is for the general advantage of society—it is the safeguard of all. He who enjoys in peace his property and his rights, is every moment indebted to the law for this enjoyment. On the other hand, the protection of the law is less effectual to him who is disturbed in his possessions, whether that disturbance arises from the obscurity of the law or the aggressions of others; he may ultimately be protected, but he will not the less be a sufferer. Without reckoning the disquietude, the troubles, which accompany a law suit, how great is the loss of time, the derangement of business, the inevitable expense incurred even under the most perfect systems of procedure. Can one compare these two conditions—the one of a full and tranquil

enjoyment of one's rights, the other of a disturbed, precarious, and contested enjoyment—and draw from them the inference, that he who has the least should pay the taxes of him who reaps the most of the common benefit of the law. Were the principles of equity alone consulted, far from levying extraordinary contributions from the honest litigant—the public, besides protecting him from unjust claims, owes him an indemnification, and the only objection to this indemnification (unfortunately a decisive one) is the danger of fraudulent and collusive suits. Justice bears the same relation to the civil condition of the citizen which military force does to external safety. The litigants are the *forlorn hope* of legal warfare. To make them pay the expenses of the administration of justice, in addition to all the burthens of a law suit, would be like compelling the inhabitants of the frontiers, in case of a hostile invasion, besides serving for nothing, to pay all the expenses of the war.

The second argument in favor of taxes on litigation is drawn from "their tendency to diminish the number of law suits," to employ the language ordinarily in use, from their tendency to repress the spirit of litigation. This argument, which has been more approved than the preceding, requires a more extended examination. The word, litigation, law suit, is used in two senses: in a neutral sense, it merely expresses the unexceptionable exercise of an essential right; in a bad sense, it implies a sort of abuse in the exercise of that right. In the first sense, taxes on litigation have never been recommended as a means of diminishing the number of suits; to avow such an intention would be neither more nor less than to announce a wish for the denial of justice. The word *law suit*, taken in its unfavorable acceptation, implies sometimes the idea of an unjust, and sometimes of a frivolous suit. Those who speak of the great advantage of taxes to reduce the number of suits have these two sorts of suits particularly in view. All suits, *bona fide* as well as

*mala fide* suits, may, unquestionably, by means of taxation, be prevented. But does taxation prevent *mala fide* litigation? Far from it. It rather encourages it. It is one weapon afforded to the fraudulent litigant.

Take the case of a plaintiff who commences a suit which he knows to be unjust. If there were no expenses till the rendition of judgment, he would have but little advantage over his adversary; he would be little tempted to commence a suit, the issue of which would be unfavorable; but the revenue law comes in to the aid of his malice and cupidity. Is he rich? A law suit is a luxury, which his fortune permits him to enjoy; he has chosen his victim; he stakes his superfluity against the poverty of the defendant; he can calculate the very moment when the defendant will be compelled to submit to his unjust claims, or to compromise his rights by a sacrifice of part. The enjoyment, and perhaps the triumph of the oppressor—the desolation and ruin of the oppressed—such are the disastrous effects of these duties, in proportion to their number and amount.

In relation to the *mala fide* defendant, if there were no legal expenses, he would, it is true, have motives to refuse a just demand, but the most powerful would cease to exist. In truth, what is it that renders his resistance obstinate? He knows the means of the plaintiff—that he cannot commence a suit without expense, and that he will hesitate a long time before leaping this barrier. The suit is commenced, it continues only by additional payments, the expenses redouble, the fraudulent defendant perceives that the energy of the attack diminishes—that his adversary gives signs of exhaustion; he is determined not to surrender; the besieger fails in ammunition; he will soon be compelled, though with right on his side, to beat a shameful retreat.

Let one consider all the motives which induce an obstinate resistance on the part of the *mala fide* defendant—ill will, avarice, passion, the difficulty of meeting the demands

made, the hope of seeing the plaintiff run ashore through some defect of proof, the expectation of some lucky accident, as the death of the party, or his witnesses—and are not all these enough? Is it necessary to add a host of taxes to induce an unlucky plaintiff to abandon his rights?

Let no one imagine this a picture of the imagination. It is what is seen every day in the career of litigation. It is true, that independently of judicial taxation, the other expenses of a law suit tend to produce the same effect. But ought the legislator to aggravate the evil because he cannot entirely put an end to it?

The other branch of suits to be lopped off are *frivolous* suits, suits for mere trifles. When one talks about an unjust suit, I understand him; when he talks about frivolous suits, I know not what he means. Is the injury a trifling one in your view that you call it thus? It is not so in the eye of him who demands reparation for it. What right have you to place your opinion above his, to wish that he should think as you do? An injury, which is trifling to one individual, is a severe one for another. In appreciating an injury, you must take account of the danger of its example and its repetition. There is no injury so slight, which, indefinitely multiplied, may not become intolerable. *At what point should the protection of the law cease?* If a man may fillip me at his pleasure, I am his slave. If he can pilfer from me a penny, he will, a penny at a time, at last find the bottom of my purse. In pecuniary causes, the smaller the sum in dispute, the less scrupulous are we to apply the term *frivolous*. But what is a large or a small sum? The term is relative to the circumstances of the party interested. The sum, in pounds, shillings and pence, proves nothing. The poor laborer who sues for a shilling demands what to him is necessary; the opulent landlord, who sues for his thousand pounds, demands what to him is mere superfluity.

Suits considered *frivolous*, whether really so or not, do

not require factitious precautions to prevent them. Were law taxes entirely suppressed, there are other obstacles, other checks, which operate in the same way, and which, unfortunately, have too much strength. The fear of failure, of loss of time, of personal inconvenience, of unavoidable expenses, restrains but too many individuals, and induces them to suffer, in preference to resorting to the law for redress. This is particularly true in relation to the poorest classes of society. Take those who live by their industry, talk to them of law suits and you frighten them; their ignorance increases the fear arising from the causes already indicated. They resign themselves to losses, they submit to injustice, rather than commence a suit against a man of wealth and influence. In addition to all these difficulties, which deter men from litigation, is it necessary to add taxes, to advance which is always burthensome, and frequently impracticable?

In speaking of frivolous causes, I ought not to forget an observation, which has only to be presented to be appreciated. I will suppose the object litigated as unimportant as you can well conceive—but after all, the plaintiff has a just suit to commence—and if he be to blame in claiming his due, is not he much more in the fault who refuses it? If the claim be just why is it not satisfied? If it be just, but frivolous, why contest it? If you accuse the plaintiff with being litigious, what will you say of the defendant? If taxation be a restraint on suits which are blameworthy, is it not an encouragement to defences still more blameworthy? No one then can think that taxes are proper to prevent suits. They tend to multiply unjust suits, those which specially ought to be prevented. In the hands of fraudulent litigants, they become the instruments of oppression and the means of success.

If it were desirable to prevent *mala fide* suits, this offence must be treated like others, a distinction should be made be-

tween the innocent and guilty, and the different degrees of fault should be marked, so that rashness should not be mistaken for malice; before punishment the offence should be clearly proved; and the expenses of the suit should not be payable till its conclusion. If one of the parties be altogether in fault, impose on him alone the whole expense of the suit. Proportion the expense to the different shades of blame; thus every man who has knowingly commenced or prosecuted an unjust suit will know, that besides the loss of his cause, he will be liable to a pecuniary fine, either by way of recompense to the party injured, or by way of a tax on every act which has tended to prolong the process.

Before closing this discussion, it is necessary to show more fully the causes which have procured for this species of taxation an approval so general, and an extension so considerable in some states. The two arguments adduced in their favor, the falsity of which has already been shown, have served less as a motive for their establishment than as a pretext for their justification.

One cause which has contributed to their general adoption is, that they have been confounded with other taxes, which, being raised by stamp and registry duties, have all the merit which taxes can ever have. Some bear only on objects of luxury, as in dice or cards, and which one pays or not at his option; others, which are imposed on contracts, though they are not strictly optional, yet at least no one is called to pay them, except at the time when he has the means of doing it. Stamp duties have this advantage, that they are difficult to be eluded. Nothing differs more widely in its results than taxation on law, and taxation on objects of luxury and on contracts. Mere superficial observers are deceived by a mere material resemblance. Stamp duties offer a good way of raising a revenue; taxes on judicial process are raised by means of stamp duties; therefore they are expedient, &c. &c. Another cause which has had much influ-

ence in the adoption of this mode of raising a revenue is, the little resistance there is on the part of the public. A duty which bears on one class alone, that a determined, well defined class, as, for instance, on domestics, on horses or carriages, excites immediately the attention and the clamor of those who are interested. The minister of finance knows that the law will be discussed, and that he will have to contend with a public opinion more or less powerful. Taxes on law procedures are not liable to this inconvenience. Litigants do not form an united phalanx, they never make common cause, they ever have conflicting interests. These taxes fall on an individual only occasionally ; they are not feared in advance ; one foresees not the event of a suit ; it comes unexpectedly, like a thunder storm ; besides, every thing which relates to a suit and its expenses is enveloped in a thick cloud. There is, then, a ready acquiescence on the part of the public, the submission of ignorance and improvidence. The minister, who is never warned by the cries of the public, nor intimidated by a general resistance, gradually augments a tax which is raised so easily, and borne with so little murmuring. There may be among the richer classes a sort of instinct which induces them to favor these taxes. Their effect, we have seen, is to give the rich power over the poor ; I include under the word poor all those to whom the cost would operate as a hindrance. It would be too much to say, that the rich prefer these taxes that they may be unjust with impunity ; but it is the weakness of human nature to love power, which, one having is generous enough to wish not to abuse.

I am very much deceived, or it has been proved that taxes on law procedure are the worst of all possible taxes ; that in many cases they amount to a denial of justice, and in more to a contribution levied on distress ; that they impose the burdens not on those who receive the most, but on those who receive the least benefit from the tribunals of the law ;

and that far from tending to diminish the number of suits, they offer a direct encouragement to all *mala fide* litigants.

J. A.

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#### ART. IV.—CODIFICATION AND REFORM OF THE LAW.

##### No. 6.

THE *system of pleading*. As a science the system of pleading is perfect, and forms a splendid monument of the acute-ness and logical accuracy of the profession which established it. If the questions which require the application of its rules, were such as involved only the discussions of the learned, on merely abstract points, few alterations could be required, and none would be here suggested. But the law and all its rules are formed for the benefit and convenience of suitors in court, and if any evils or inconveniences are found to attend the existing system, it ought to be modified for their advantage.

A great objection then to the rules of pleading is, as we conceive, that they are too scientific. Originally almost all actions at the common law regarded real estate. Great precision was requisite in such actions, because of the artificial rules affecting real property. The cause of action was in general single in its nature, and admitted of great certainty and distinctness in the allegations, and the defence was not involved in complexity. If the pleadings therefore corresponded with the nature of the subject, they might be reduced to a system approaching to the certainty and precision of mathematical science. But the simplicity of ancient times has become changed. The transactions of life are more complicated. The causes of action are various, and the pleadings vary with the diversified circumstances of individual cases. The singleness, precision, and scientific certainty, which belonged to pleadings in real actions, seem inapplicable therefore to cases attended with this complexity.

of character. The great object of the rules of pleading is the fair investigation of the subject matter of actions, and so far as they are found not to be adapted to this end, they require amendment. Substantial advantage ought never to be sacrificed to the symmetry of an artificial system.

Of the actions founded upon contract, the most important are debt and assumpsit. The grand distinction between them is, that the action of debt is the proper remedy for the breach of engagements founded upon specialties, whilst the action of assumpsit is appropriated to promises of a lower grade. Notwithstanding the distinction which is preserved between these actions, it is apparent that they are founded on claims, which in character are not dissimilar. The difference is in the evidence adduced to support the actions. The action of debt is supported by a promise in writing, attended by the formality of a seal, except when it is a concurrent remedy with assumpsit, an action which is sustained by evidence of a simple promise. In the defences in assumpsit and debt, there is no reason for any distinction. A difference however exists, which seems to depend wholly on the forms of pleading. In the action of assumpsit, various equitable defences are admitted, which cannot be made in the action of debt. Assumpsit is in truth an equitable action. The plaintiff recovers only that to which, *ex aequo et bono*, he is entitled. Although the plea of the general issue is a denial of the promise, almost any defence is allowed, which shows that at the time of the bringing of the action, there was not justly an indebtedness. In the action of debt this latitude is not allowed. The inquiry relates to the original cause of action, and if this can be established, a recovery often is permitted, however inequitable the claim may be. There is no foundation for this other than what grows out of the rules of pleading, and the result is a perversion of justice. All defences to a claim, which are admissible in any form of action, show that the plaintiff is not in justice entitled to recover, and the

exclusion of the defence proves that the rules which require it are defective. In cases, where debt is the only remedy, every real defence ought to be admitted, because the debt evidenced by a specialty is not of a higher character than the debt which constitutes a simple contract; and, in cases where debt and assumpsit are concurrent remedies, there can be no good reason offered, why every equitable defence should not be allowed in one form of action, which is admissible in the other. It is true, that in debt a defence may be specially pleaded, but if any advantages are found to result from the practice in the action of assumpsit, why should they not be extended to claims of the same character in another action?

It has been a subject of controversy in England, whether a plaintiff may allege his gravamen as a breach of duty arising out of a contract; considering that breach of duty as tortious negligence, in certain cases, or whether the same circumstances are to be considered as forming a breach of contract. In the case of *Govett v. Radnidge* (3 East, 70,) it was decided that the court might allow it to be considered either way, according as the neglect of duty, or the breach of promise, is relied upon as the injury; and that the plaintiff, according as the convenience of his case required, might frame his principal count in such a manner, as either to join a count in trover therewith, if he have another cause of action, other than the action of assumpsit; or to join with the assumpsit the common counts, if he have another cause of action to which they are applicable. But in the case of *Powell v. Layton*, (2 New Rep. 365), the case of *Govett v. Radnidge* was overruled by the court of common pleas,—as well as in the case of *Max v. Roberts et al.* (2 New Rep. 454), and the question may still be considered as unsettled. The court of common pleas regarded the contract and not the tort as the foundation of the action, in all cases arising out of contract. Whichever may be regarded as the better

opinion, it would seem to be manifest, that the decision first above mentioned, which gives an election to proceed for the breach of an express contract, either in *assumpsit* or in *case*, is more beneficial to the plaintiff.

It is only by a sort of legal fiction, that such an action is treated as an action on the case. Serjeant Bailey, in *Powell v. Layton*, who argued in support of the action in that case, said, “there are *two kinds of actions of assumpsit*, one which confines itself to the contract only and makes the breach of the contract the ground of complaint, the other that which founds itself upon the carelessness and breach of duty of the defendant.” Such indeed is the character of all actions founded upon contract; the breach of contract may always be considered a violation of duty, and the failure of performance, a tort. The reasons, therefore, which are urged in *Govett v. Radnidge* for supporting an action framed in tort, though founded on contract, and for permitting a count in trover to be joined, apply equally to all breaches of contract. Lord Ellenborough considered it an object to avoid pleas in abatement, for not joining other joint contractors, as every new defendant, who may be successively brought forward and disclosed by successive pleas in abatement, may in his turn plead that there are still other parties to the contract, who ought to be and have not been joined as defendants, and thus open a door to endless vexation and expense, as against the plaintiff, in successive stages of unprofitable delay. His lordship had no doubt of the inconvenience of opening a door to these pleas in abatement, in all cases, which may in any possible respect be considered as originating in contract, express or implied, though the question in that case regarded rather the established and recognised practice in courts of law, and the court decided that the acquittal of one defendant in that action did not affect the right of the plaintiff, to have his judgment as against the defendant, against whom the verdict had been obtained. In the

case of *Weall v. King et al.* (12 East, 452), the question having been much discussed in the common pleas, in the mean time, in the cases mentioned above, lord Ellenborough seemed to decline deciding the case by reference to cases of doubtful authority, but said the plaintiff must fail, because, although a tort was alleged to have been committed in a joint sale, the proof of the contract did not correspond with the description of it in all its material parts, and that the allegation of a joint contract was essentially necessary to support any action whether in assumpsit or tort, where the statement of a contract became necessary to be made. The authority therefore of the case of *Govett v. Radnidge* may be considered as somewhat shaken; still it cannot be denied, that the rule laid down in that case is one of greater convenience than a rule which admits of a plea in abatement for the omission of a party who may have jointly contracted. If this would be a convenient practice, in actions which admit of being framed as for a violation of duty, or for a breach of contract, why is not the same true of all actions of assumpsit; for, after all, an action founded upon contract, though laid in tort, is but a species of assumpsit, and any breach of contract may be described as tortious. The right of a party ought not to be affected by forms of action. If the ends of justice may be promoted, by ousting the plaintiff of his plea in abatement, in one case, the like advantage must result from a general extension of the practice. It is believed, that no evils would attend the change, and that some inconveniences would be avoided.

If an action of assumpsit is made to conclude as if founded on a tort, (a fiction in point of form, which would certainly seem as proper in all cases as in *Govett v. Radnidge*), then a count in trover and also counts in case might be joined. There are cases, in which it would be desirable to declare also in trover, as well as for a breach of contract, where it is uncertain whether a contract can be proved, and the tort

may amount to a conversion. In some cases, also, an advantage may arise from adding a count in case in an action of assumpsit; as, for example, when it may be uncertain whether a contract of warranty can be proved, or whether the action may depend upon circumstances of deceit and fraud.

The rule for deciding whether two counts can be joined, is by considering whether the same judgment can be given on both, and the same plea pleaded. This is a mere consideration of form, and if convenience requires it, it is better to change the forms of pleading, than to permit them to embarrass justice.

In the action of detinue, debt may be joined, though in these actions the pleas are different, and the judgment also varies. This joinder is allowed because the practice is sanctioned in the *Registrum Brevium*; but the practice shows that a departure is sometimes allowed from the general rule mentioned; and since the rule on the subject of double pleading has been changed by statute, the rule respecting joinder of actions seems of less importance. In a former number, we suggested the propriety of providing by statute, for the joining in the same action counts in trespass and in trespass on the case. This seemed preferable to the provisions of the New York revised statute, on the same subject, which indeed substitutes the action of trespass for the action on the case, and thus in effect abolishes the distinctive qualities of the latter form of action. This would seem to be inexpedient, because the mischief regarded may be fully provided for by the joinder of the counts, and the action of trespass is not adapted to the description of wrongs, to which the action of trespass on the case is applicable.

If counts in trespass and case are permitted to be joined, it is manifest that the same rules ought to be established for each form of action, because, although the plea of the general issue is the same in both, yet in other respects, as was

held by lord Mansfield in *Bird v. Randall* (3 Bur. 1353), there is an essential difference between them. The former are actions *stricti juris*, and therefore a former recovery, release, or satisfaction cannot be given in evidence, but must be pleaded; but in an action on the case, which is in the nature of a bill in equity, a former recovery, release, or satisfaction need not be pleaded, but may be given in evidence; and whatever may in equity and conscience preclude the plaintiff from recovering, may in case be given in evidence by the defendant. In trespass, where the act would at common law, *prima facie*, appear to be a trespass, any matter of justification or excuse, or any thing done by virtue of a warrant or authority, must in general be specially pleaded.

By a late act of the legislature of the state of Connecticut (May 1836), it is provided, that "one or more counts in trespass on the case, founded in tort, may be joined with one or more counts in trespass, in the same declaration, when all of such counts are for the same cause of action;" but no provision is made for a uniformity of pleading to these different counts, and even when all the counts are for the same cause of action, the general issue may be pleaded to those counts which declare for trespass on the case, whilst it may be necessary to plead the same matter specially to the counts in trespass. Great confusion may be the consequence of this inconsistency. The statute of limitations also requires an action of trespass on the case to be brought within six years after the right of action shall accrue, but the action of trespass is confined to three years. For the same matter, therefore, stated with the slight characteristic differences of these actions, the same plea is not sufficient, and the cause of action may be barred by the statute in one count, though the bar does not apply to the other count. It may happen, therefore, that the evidence is not sufficient to support the count in trespass on the case, but proves a direct and immediate injury; and yet there can be no recovery, because the

count in trespass is barred. This has often happened in doubtful cases, where the character of the evidence was uncertain, and the amendatory statute alluded to fails to apply an adequate remedy. The object of the statute was to provide for cases of doubt, when it was uncertain whether the cause of action fell within the limits of *trespass* or *case*. To admit of different rules of pleading, and different times of limitation, in actions thus united, is manifestly absurd.

*Venue.* The distinction, which is made between transitory and local actions, seems of little importance, since the jury are no longer required to come from the vicinage. In some cases, there may be two or more actions in effect for the same injury, the one local and the other transitory, as in debt for rent, and covenant for rent. Debt by the assignee or devisee of the lessor against the lessee is local, and must be laid in the county where the estate lies; in covenant at the suit of the same parties, upon an express covenant for the payment of rent, &c., the venue is transitory. It is unreasonable, that the form of action merely should vary the place for trial of the cause of action.

*Ejectment.* Almost all the ancient actions relating to real property have yielded to the modern remedy of the action of ejectment. There are certain inconveniences attending this action, some of which might be removed by judicious legislation. The machinery of the proceedings is certainly unnecessary, especially in this country, where estates in real property are not embarrassed with complicated interests as in England, and it was absurd to copy the useless forms from the English system. The use of fictitious names, instead of bringing the action in the name of the real parties to the suit is sometimes attended with mischief. In England, it has been decided, that the lessor of the plaintiff cannot release the action; Bayley, J., saying, "that as regards the record, we must consider John Doe as the real party;" *Doe v. Brewer* (4 M. & S. 302). The law has however been

differently held in New York (2 Wend. 541); but the death of a lessor does not abate the suit; *Frier v. Jackson* (8 Johns. Rep. 495). The operation of the consent rule has not been found sufficient in all cases for the purposes of the action; defendants having, in many instances, after the title has been established, put the plaintiff to give evidence, that defendant was in possession at the time of the ejectment brought. This was provided for by a rule of court, (4 B. & A. 196), in the several courts, as being contrary to the true spirit of the consent rule. But, in truth, the whole machinery of the action is entirely unnecessary, and in several of the states, the proceedings in ejectment have been greatly simplified, and in New York all the fictitious parts of the action have been abolished. The action is brought in the name of the parties actually interested; and, without the formality of confessing lease, entry and ouster, the right of possession is tried.

In the case of *Lade v. Holford* (Bull. N. P. 110), lord Mansfield declared, that he and many of the judges had resolved never to suffer a plaintiff in ejectment to be nonsuited by a term standing out in his own trustee, or a satisfied term set up by a mortgagor against a mortgagee; but that he would direct the jury to presume it surrendered. Lord Mansfield's meaning probably was, that a plaintiff in ejectment may recover on an equitable title; but it was subsequently held, that the party who is not clothed with the legal estate cannot prevail in a court of law; (7 T. R. 49; 8 T. R. 122); and in *Shewen v. Wroot* (5 East, 138), lord Ellenborough said: "As to the doctrine that the legal estate cannot be set up at law by a trustee against his *cestui que trust*, that has been long repudiated." By the operation of this rule, courts are precluded from an inquiry into the real justice of the case, unless the jury may be authorized to presume a surrender or conveyance of the legal estate; but, in one case, between the mortgagor and mortgagee, by the

statute of 7 Geo. 2, c. 20, § 1, an equitable inquiry is admitted into the relations of the parties, and it may certainly in all cases be allowed with equal safety. In Pennsylvania, it is understood that a plaintiff in ejectment may recover upon an equitable title; 3 Dall. 425. Where the proceedings still correspond in form and in substance to the English action of ejectment, a strict conformity to its rules may be necessary; but where the inquiry, untrammelled by technical rules, relates merely to the actual right, it is believed that the equitable right ought to be established.

An evil attending the action of ejectment is, that in most of the states it does not definitively settle the title, nor is it a bar to another action; so that to obtain a conclusion of endless controversy, the interposition of a court of chancery is necessary. This is a great evil, and it results merely from the technical rules applied to the form of action. Another inconvenience is the necessity of bringing a new action for a recovery of the mesne profits, after a recovery in the action of ejectment; this is more remarkable as in the action of ejectment, there is a recovery of nominal damages. The action of ejectment does not furnish an adequate remedy for the invasion of estates in land. It regards only the possessory title, and does not conclusively establish the right of property. It was originally introduced to avoid the difficulties attending the real actions in use in England. These were found not to be adapted to the complex interests which had grown up in this species of property. The action of ejectment had at least the advantage of simplicity. The writ of right, the highest writ in the law, lay for an estate in fee simple, and not for any less estate. There were others in the nature of writs of right, as the writ of formedon and some others.

If these writs of right were divested of every thing which tended to embarrass their use, and if the plaintiff were permitted to recover according to his title whatever that might

be, provided he had shown a better right than the defendant, it is believed that a recurrence to them would be attended with advantage; but the forms of action ought to be adapted to every variety of estate and title.

Formerly, when estates passed by feoffment, a recovery in a writ of right was regarded as equivalent to a feoffment. The various modifications of title which are created by grant were unknown. Instead of adapting the actions to the changes of the system, their use has been almost entirely abandoned.

We are inclined to believe that the substitution of the action on the case, in the place of the ancient forms of actions for injuries to real property, has been attended with injurious results. There are certainly conveniences in this action, but they are attained by breaking down the sound and logical rules which regulated those actions. The action of waste, for example, must be brought against tenant by the courtesy, tenant in dower, tenant for life, years, &c., for the waste done by a stranger, and these must take their remedy over; Co. Lit. 54, a. The action cannot be brought directly by the reversioner against the stranger. He can only proceed against the tenant in possession. This rule, except in the case of tenant by the courtesy and tenant in dower, is founded upon the privity of contract existing between the reversioner and the tenant. Where the liability of the tenant depends upon contract, until the contract is produced, the presumption is that the tenant is without impeachment of waste. The liability of the stranger to the reversioner is not greater than that of the tenant, for if the tenant is without impeachment of waste, the tenant alone has an action against the stranger. It was a wise provision of the law which required the action of waste to be brought against the tenant. But in the case of *Attersoll v. Stevens* (1 Taunton's Rep. 183), the court of common pleas recognised the propriety of an action on the case in the nature of waste by

the reversioner against a stranger; and such an action was sustained in the case of *Randall v. Cleaveland* (6 Conn. Rep. 328). The same doctrine is laid down by Chitty, (Pleadings, vol. i. 142; vol. ii. 345, in note), but he is by no means supported by the authorities which he cites. In the cases alluded to above, the courts seem to have disregarded the true principle, which confined the action of the reversioner to the tenant; they consider the rule as merely technical, and as applying to the action of waste as a matter of form and not to the cause of action. The grant of an estate for life or years, gives *prima facie* to the tenant the absolute control of the subject, and as consequent thereto the right to commit waste, except maliciously; and if this right of the tenant is restrained by a provision inserted in the grant, this provision has the effect of a contract between the parties, which may be enforced or waved at the election of him for whose benefit it was made, and with which strangers have no concern. The effect of this contract is to protect the reversioner against the invasions of a stranger, as well as against the tortious acts of the tenant.

The effect of the contract is not to give the reversioner any rights against a stranger, because no actual interest is reserved, (such as exists when some part of the subject demised is reserved), and the stranger is liable only to the tenant. The propriety of this rule is manifest. The policy of the law is to avoid a multiplicity of actions, and, therefore, the party doing the injury is not made liable to two actions, to the tenant, and also to the reversioner.

If such an action were sustained, by the reversioner against a stranger, if the tenant were without impeachment of waste, so that the plaintiff had sustained no injury, and the defendant was liable only to the tenant as a trespasser, still, not being *privy to the contract* he could not plead the rights of the tenant, and he would be unjustly subjected to the action. Neither could the defendant in such a case plead

a discharge of the tenant, a former verdict for the full amount of the injury recovered of the tenant, nor any other defence founded on privity.

In an action by the tenant against the trespasser, the defendant would have no claim to be recouped in damages, because of his liability to the reversioner, so that the defendant might be in effect twice subjected for the same cause of action.

Tenants by the courtesy and tenants in dower come in by act of law, and not by act of the parties; and, therefore, there is no privity of contract between such tenants and the heir; still there is *privity* between them. The heir recovers of the tenant in an action of waste, for waste done by a stranger, and the tenant has his remedy over. The relations of the parties are analogous to those of bailor and bailee of goods; the bailee may support an action, for an injury to the goods, and the bailor can bring no action, unless he has the right of immediate possession. It is true, that an action on the case was always sustained by the reversioner for certain injuries to his reversionary interest, but never, we believe, whilst the action of waste was in use, in cases where the tenant was liable in that action for the same injury. The actions which were supported were for consequential injuries.

But the late decisions, and the authority of Chitty, have overthrown these reasonable distinctions, and the action on the case in the nature of waste, which the reversioner may bring in all cases against a stranger, will enable him to recover, even although his tenant may be without impeachment of waste and therefore not liable.

It is apprehended, that some mischief will be found to result from this laxity of practice, which may be properly remedied by a recurrence to the restrictions and rules of the ancient form of action.

*Writ of Nuisance.* In the state of New York, the writ

of nuisance and some parts of the action of waste are the only real actions, which are retained by the Revised Statutes; all other real actions known to the common law are abolished. The action on the case to recover damages for a nuisance is a very inadequate remedy for this injury. It provides a satisfaction, but does not remove the nuisance. Two other actions were therefore provided; the assize of nuisance, and the writ of *quod permittat prostertere*, which give a satisfaction in damages, and remove the cause itself.

There is one inconvenience attending the use of these two actions, that the freehold must be in the plaintiff and defendant respectively, whereas the action on the case is maintainable by one that has possession. In other respects, these actions are preferable to the action on the case; and, it is believed, it would be desirable to extend these remedies to the lessee for years and to other cases, where an action on the case is now admitted.

The action ought also to be allowed against the alienee of the party who first did the injury, as well as the wrong-doer, and also for the alienee of the party first injured. These two actions of nuisance were in the nature of writs of right, and were therefore confined to the tenant of the freehold; but an adequate remedy ought to be provided, for all parties injured by a nuisance, however limited their estate may be; and, ordinarily, the only sufficient remedy is an abatement of the nuisance. The estate of the plaintiff should be stated, as it actually exists in him, and the defendant will only be concluded to that extent.

When the injury affects the reversionary interest, and not the lesser estate, the action ought to be brought by him who has the freehold.

In these actions, the plaintiff ought to be permitted to proceed against the wrong-doer, though his estate may be less than a freehold.

*Detinue and Replevin.* It has been generally understood

and stated as the law, that the action of detinue could not be supported, if the defendant took the goods tortiously, (3 Bl. Comm. 152), and that replevin can never be sustained when the original taking may have been justifiable. The action of detinue has gone very much out of use, because the wager of law was once in practice, and replevin and trover have been substituted as remedies.

In the case of *Badger v. Phinney* (15 Mass. Rep. 359), and in the case of *Baker et al. v. Fales* (16 Mass. Rep. 147), it was decided that an action of replevin might be supported for a wrongful detention of the plaintiff's goods, although the original taking was not tortious. These cases are opposed to the case of *Gardner v. Campbell* (15 Johns. Rep. 401), in which it was decided, that replevin would not lie against an officer who had taken goods on an execution, but who afterwards received the full amount of the same with all charges, and then refused to deliver them to the debtor.

In most of the English books, it has rather been assumed than asserted, that the action of replevin lies only when the taking is tortious, and the question has not perhaps been directly decided in England. It appears from the remarks of lord Redesdale (1 Scho. & Lef. 324), that replevin was in use in Ireland in cases where no taking was suggested, and his lordship regarded the abuse of the process of replevin, as a crying grievance in that country.

The only authority of much weight which was cited by the court, in *Baker v. Fales*, is Fitzherbert's N. B. 69. "If a man take cattle damage feasant, and the other tender sufficient amends, and he refuses to deliver them back; if he sue replevin, he shall recover damages only for the detention and not for the taking, for that was lawful." This is probably the only instance in which replevin lies in England where the original taking was not tortious. The true distinction is founded upon the right of possession, and

this principle embraces the supposed exception. When the plaintiff in replevin asserts that the property was taken unlawfully out of his possession, it appears from his declaration, that he has the right of possession, but when the plaintiff alleges that the defendant became possessed by virtue of a contract, and detains the property unlawfully, the right of property is *prima facie* in the defendant, because it is a rule of law that the first evidence of property is possession, and that when the right of property is invaded, the *onus probandi* is thrown upon the party who is out of possession. If, in the former case, the allegation of the unlawful taking is true, the defendant has by his unlawful act reversed the rule of presumption, and therefore the law, which will not permit a party to take advantage of his own wrong, has provided the process of replevin, to reinstate the party, who was unjustly deprived of possession. In the case stated in Fitzherbert, the distress is made by authority of law, and on the tender of amends, the right of detention ceases, and the plaintiff's right of possession revives. If the law will not permit the party to take advantage of his own unlawful act, and restores possession to him who has the right, *a fortiori* it will restrain him from taking an unjust advantage of authority or process of law. In such a case possession furnishes no presumption of title. It appears that the plaintiff's possession has been invaded, and for a cause which though originally justifiable has ceased to exist. It is apparent, then, that the true reason of the rule is the presumption resulting from lawful possession.

It is true, as observed by the court in *Baker v. Fales*, that the plaintiff in replevin can always set forth a sufficient cause of action; and, upon giving the security required by law, he has a right to have the goods delivered to him; but an abuse of the process of the court is always punishable, if the security given is not an adequate protection, and the danger of abuse furnishes no reason for sustaining the process, when an insufficient cause of action is stated.

The effect of the rule established in Massachusetts is to take the property from him who is in lawful possession, and, when the defendant claims the right of property, to transfer the burden of proof from the plaintiff to the defendant. The defendant in replevin may plead property in himself, or in a stranger, either in abatement, or in bar, but he is compelled to support his plea by evidence, and cannot rely upon the presumption resulting from possession. This was not contemplated by the court, but the consequence is inevitable, unless the course of proceedings in replevin is entirely changed.

The object which the court desired to attain was the restoration of the specific goods unlawfully detained, and not to change the rules of evidence respecting the right of property.

The decision of the court subverts all established rules and all true principle. The restoration of the goods to the claimant proceeds upon an assumption of the very right which it is their duty to try.

The remedies established by the common law are in the main adapted to the rights of the parties, and correspond with the rules of property and of evidence. The action of replevin restores the possession to the party who has the right, and who has been unlawfully deprived of it. The action of detinue provides an adequate remedy for the party who has not *prima facie* the right of possession, by a judgment for the goods specifically, after the right is established. In either case, after a final decision of the right of property, it is possible that the goods may be *elogned*, so that the party may be compelled to accept a pecuniary satisfaction.

The action of detinue, however, might be rendered a more effectual remedy, if the judgment rendered was for the goods specifically; and not a judgment, which, at the election of the defendant, allowed him to keep the goods, if he chose to pay their value; the judgment certainly ought to be such

as will enable the sheriff to restore the specific goods. The doctrine established in the case of *Baker v. Fales* prevails also in the state of Maine (4 Greenleaf, 315); and has long been acted upon in the state of Pennsylvania (1 Dall. 157). In many of the states, the question may be considered an unsettled one; and, it is therefore peculiarly proper for legislative settlement. In the state of New York, notwithstanding the true principle has always been followed, chief justice Savage seems to regret, in *Marshall v. Davis* (1 Wend. 114), that he was not at liberty to follow the Massachusetts doctrine.

It is probably supposed, that this doctrine, even if inconsistent with what may be considered arbitrary and technical rules, has established a more convenient and equitable practice; but this is a misapprehension. These rules are founded upon the right, which the party in possession has to retain possession, until the right of property is decided against him. The new doctrine not only gives the possession to the claimant; but deprives the party who was in possession of the benefit of the presumptive evidence resulting from apparent, undisturbed, possession. Even if the court should allow the party the benefit of the presumption, when the action is founded upon a taking which is not tortious, still to give the plaintiff the benefit of possession, between the bringing of the action and the rendition of judgment, when the *prima facie* presumption is unfavorable to his claim, is indeed strangely anomalous.

If, however, this principle is adopted generally, the subject, it is believed, should be regulated by statute, and the pleadings especially be made conformable to this innovation in practice. *Non cepit* is clearly not a sufficient plea of the general issue, except when the original taking is wrongful.

*Pleas in General.* It is believed that great advantage has resulted from the change in the rules of pleading, which

allows so many defences, which deny the right of recovery, and which were formerly specially pleaded, to be given in evidence under the plea of the general issue. By requiring notice of special matter, the danger of surprise is avoided, and all the benefits of a special plea are attained, without entangling justice in the net of form. The liberality of practice in this respect is peculiar in the action of *assumpsit*. Its propriety has been doubted, and it has been thought irregular, that under the general issue, which in terms only denies a valid contract, the defendant should be permitted to avail himself of a ground of defence, which admits a valid contract, but insists that it has been performed, or that there is an excuse for the non-performance of it, or that it has been discharged. No evil has however been found to result, and it may be desirable to permit all defences thus to be given in evidence, under the general issue in *assumpsit*, such as a tender, a set-off, and the statute of limitations, and that the plaintiff became an alien enemy after the contract was made.

It may here be suggested, whether it would not be advisable, in all cases, where this practice is admissible, also to restrain the right of the defendant of pleading at his option any matter specially. It is said by writers on the subject of pleading, that it is in general advisable to plead infancy specially, in *assumpsit*, because the plaintiff will thereby be compelled to reply only one of several answers which he might have to the defence. It is undoubtedly advisable for the defendant thus to plead, because it shuts out the plaintiff from establishing his case, by answering this defence as fully as he might do under the general issue; but is not this advantage secured to the defendant, by obstructing the course of justice? Would it not be better to permit a free and full inquiry into every fact relating to the point in controversy, which might tend to establish the right of either party?

It is believed, that it would be equally beneficial to permit all defences to be introduced under the general issue in other forms of action than *assumpsit*, under proper regulations.

*Replications.* The statute of 4 Ann. c. 16, did not change the rule on the subject of *duplicity* in *replications*. They must not contain two answers to the same *plea*. The principal reason assigned for this is, that if two issues were permitted to be joined upon two several *traverses* on the plaintiff's *replication*, and one should be found for the plaintiff, and the other for the defendant, the court would not know for whom to give judgment, whether for the plaintiff or the defendant. This argument can have no weight when each *replication* constitutes a sufficient answer to the *plea*; for, if either issue is found for the plaintiff, judgment must be rendered in his favor.

S. F. D.

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#### ART. V.—NEW BRUNSWICK JURISPRUDENCE.

*Reports of Cases adjudged in the Supreme Court of the Province of New Brunswick, commencing in Hilary Term, 1835.* By GEORGE F. S. BERTON, Barrister at Law. Fredericton. John Simpson. 1835. Pp. 204.

THE decisions of the highest judicial courts in the British North American provinces, do not seem to have been estimated by the profession there, at their fair value, since so little care has been taken for their preservation. No one will pretend that they were not worth the pains. The systems of colonial government have long been settled; the general outlines of colonial jurisprudence have been traced by authority; and the benches filled with able judges, whose labors have been bestowed for more than half a century, in the exposition of general as well as local law; yet the benefit of their judgments is, for the most part, still confined to the

few who are so fortunate as to possess manuscript notes of them. This is a common misfortune to the profession; but must be peculiarly such to colonial lawyers, and especially to the bar of Lower Canada, whose system of jurisprudence, however symmetrical, is still but a beautiful mosaic of English and French, civil, canon, and common law. Our brethren of Louisiana, under a similar system, are exempted from this calamity, by the early care of Judge Martin. We are not aware that any decisions of the court of king's bench in Lower Canada have been published, except some of those in the district of Quebec, by Judge Pyke and Mr. Stuart; the former being a pamphlet of some eighty pages, published in 1811; and the other a single octavo of select cases, decided between the years 1810 and 1835. Both derive their chief interest from the learned judgments of that enlightened and accomplished jurist, chief justice Sewell, who has thus reared for himself a monument of imperishable fame. Among the cases reported by Mr. Pyke, our attention has been particularly drawn to that of *Forbes v. Atkinson*, as containing a masterly exposition of the science of pleading peculiar to the law of Canada; and at the same time a most lucid development of the great principles of this branch of the law of remedy, common to all civilized nations.

The multiplicity of books of reports is generally regarded as an evil, and felt as a burden on the profession. To some extent it is so; but it is an evil not without its redeeming circumstances. It serves to make us acquainted with the systems of our neighbors; it renders the intercourse of jurists and legislators more frequent and intimate; and operates, with the increased intimacies of trade and travel, both to render uniformity of laws and customs among contiguous states, more interesting and desirable, and at the same time to promote it. The great principles, indeed, of the jurisprudence of all civilized nations are, like the features of men, essentially the same. The code of the laws of intercourse

and traffic among men is enlarging itself on all sides, as that intercourse increases ; and the process is rapidly going on, by which nations are gathered into a common family. The systems of their laws are, *pari passu*, becoming one ; elaborated, expounded, watched over, by the unceasing vigilance and untiring labors of all living jurists ; and the decisions of respectable tribunals in other sovereignties, though not authoritative and binding, are yet allowed to be read, at this day, in all the courts, it is believed, of the old continent, as well as in England and America, as important aids in the administration of justice. The code thus formed may be likened to public opinion, defined by Mr. Lieber, with his peculiar precision and completeness, as " the general sentiment of the community, made up of individual opinions, modified by one another." (Pol. Ethics, p. 257.) Of the law merchant, indeed, received as it is, as the common law of the mercantile world, every judge may be said to be an authorized expositor ; and what is true there is daily becoming so in all other branches of unwritten law, not of mere local application.

In this view, as well as for its direct influence on the judges themselves, the publication of judicial decisions is desirable. And though the learned judges of the Canadas and New Brunswick have not, hitherto, and in this mode, yielded their just contributions to the common stock of legal science, yet the late publications afford promise that it will hereafter be duly, and we may add, most liberally paid.

Mr. Berton, of whose work a brief notice was given in our last April number, seems to have commenced his reports in Hilary Term, 1835, as a private enterprise, but with the approbation of the judges. It was not till 6 W. 4 (March 8, 1836), that an act was passed to provide for reporting and publishing the decisions of the supreme court of the province ; under which statute Mr. Berton was appointed to

the office of reporter; and by which he is required to obtain "true and authentic reports of such opinions, decisions and judgments;" and to "publish not less than two hundred copies of the same in pamphlets, after each term of the said court." The work before us is his first publication under this act; and contains the cases of Hilary and Trinity Terms, 6 W. 4; to which the author has prefixed the cases decided during the preceding year. It is to be regretted, that to these latter cases he has prefixed no marginal abstracts of the points decided; an annoying departure from all modern usage, for which, as he has in the subsequent cases evinced so much ready talent in abstracting the elements of the decision, we are utterly at a loss to account. The only atonement we are willing to receive for the omission, is the insertion of a full and perfect note of each point adjudicated, in the table of contents at the end of the volume, when completed. There is another inconvenient peculiarity, in the omission to insert the names of the cases, either in the side margin, or at the top of the page, agreeably to the practice of all modern reporters; an insertion which would have cost little or nothing, and would have saved much time and trouble in consulting the book. We take these two exceptions to the work, the more readily, seeing that, in all other respects, it is *omni exceptione major*.

In regard to the decisions themselves, in point of the research and learning displayed, as well as in the disposition evinced in the court to maintain settled principles of law and at the same time to adapt them, in all practicable ways, to the exigencies of modern society, they certainly bear a favorable comparison with those in many books of higher pretension. The case of *Wilt v. Jardine*, respecting the operation of the provincial statute regulating conveyances of land, which is substantially similar to those of most of the United States; and that of *Hannington v. M'Fadden*, upon the question whether the statutes of uses and of inrollments,

27 H. 8, extended to the American provinces, are particularly interesting to American lawyers.

The only one, in which we feel inclined to express our dissent from the opinion of the learned court, is that of *Read v. Smith et al.*;—not, however, upon the point directly in judgment; but upon an ulterior question, upon which an opinion does not seem to have been demanded by the state of the pleadings. The action was trespass *quare clausum fregit*, brought by the owner of a meadow, for casting timber logs upon his close, and with oxen, &c. tearing up and subverting his soil. The defendants pleaded in justification, that Smith was the owner of certain timber in the Nepisighit river, which was floating to market, when the river rising by a sudden flood, the timber, against his will, and to his great damage, was driven by the wind and current upon the plaintiff's meadow, and there left by the receding waters, without the power of the owner of the timber to prevent it; and that being under the most urgent necessity of taking the timber to market in order to fulfil his engagements, and having no other means so to do, and knowing that it would more injure the plaintiff's land by remaining there, than in the removal, he, with the requisite teams, and with the least possible damage, entered and removed the timber. The question was raised by a general demurrer to this plea; and the court adjudged the plea bad, because it did not exonerate the defendants from all fault, by showing that they had used their best endeavors to prevent the timber from coming on the plaintiff's land. And this judgment is most satisfactorily sustained, by the reasons given by the learned judges. But the opinion which they further intimate, and which the reporter has deemed sufficiently deliberate to be placed at the head of the case under a *semble*, is, that an entry and removal of the timber, under such circumstances, could not be justified by any averment of care and diligence on the part of the owner to prevent it from resting on the plaintiff's land. To this length we are in nowise prepared to go.

Generally, it is true, the owner of property is protected in the exclusive enjoyment of it. But not universally; for there are many cases in which this right of the owner must yield to that service, which the members of the same community may have in each other's lands, under peculiar circumstances. From the earliest days of the common law, of which we have any judicial records, four classes of cases have been recognised as justifying an entry into another's close. 1. The first is where the entry was to save life. "If one be assaulted, and like to be killed, and he flye through my ground to save his life, I may not sue him for this."<sup>1</sup> The principle of this case, we think, would extend to the life of any other person than the defendant, which he might be endeavoring to save.

2. Where the object of the entry was, to avert or prevent a common danger; such as fire, flood, attack of enemies; or the destruction of dangerous or mischievous beasts of prey.<sup>2</sup>

3. Where it was for the purpose of staying and arresting felons, or preserving the public peace.<sup>3</sup> These and the last mentioned cases may be referred to one common principle, the public safety.

4. Where it was to identify and retake things stolen.<sup>4</sup> In the latter case, the point was expressly limited to things stolen, excluding merely tortious takings.

To these, we think may be added a *fifth* class, comprising the cases of necessary or involuntary bailment; where the goods of one man, by the superior and overpowering force of the elements, or by ungovernable brute force, are carried on to the land of another. This may be referred to the sup-

<sup>1</sup> 37 H. 6. 37, cited in 4 Sheppard's Abr. 136.

<sup>2</sup> 21 H. 7. 27; Dyer, 36, b; 12. H. 8. 2; Bro. Tresp. 40; 4 Shep. Abr. 136, 137.

<sup>3</sup> 4 Shep. Abr. 137; Bro. Tresp. 327, 354.

<sup>4</sup> 4 Shep. Abr. 138; Higgins *v.* Andrews, 2 Rol. Rep. 55.

posed fundamental principles of the social compact; or to the necessities, or the tacit consent of society; or to the demands of our common religion. In 6 Ed. 4. 7, it was said by Choke J., that if the wind blows my tree upon the land of another, I may enter and take it, and it is no trespass; for it was the act of the wind, and not of me.<sup>1</sup> And with this agrees the Roman law; by which the proprietor of ground, on which the property of another is carried by a flood, is obliged to suffer him who had the loss to take away what remains, and to allow him such free access to his ground, as is necessary for that purpose. But the owner of the goods is bound to indemnify the owner of the land for all damage occasioned by their lying there, and by the act of removing them. Yet if he chooses not to take the goods away, he is not liable.<sup>2</sup> The same doctrine is laid down by Mr. Hammond.<sup>3</sup> The case of cattle escaping, without the owner's fault, or driven by a dog, against the owner's will, into the close of another, falls under the same principle; and so it has been repeatedly held.<sup>4</sup> The cases cited below were decided upon the ground, that the defendant's property came into the plaintiff's close without any direct or immediate human agency, and without any fault of the owner of the goods; in which case he is not obliged to ask leave of the proprietor of the close, in order to enter and take them; and therefore is not a trespasser in so doing, whatever remedy the latter may have, in another form, for remuneration of his actual damage.

Where the goods of one are placed within the close of

<sup>1</sup> See also *Nicholson v. Chapman*, 2 H. Bl. 254.

<sup>2</sup> *Domat's Civil Laws*, book 2; tit. 9, sec. 2, art. 3, 4.

<sup>3</sup> *Hammond's N. P.* 168, sec. 3.

<sup>4</sup> Such a justification, in trespass, was held good, in 21 Ed. 4. 64. pl. 37. See *acc. Millen v. Fandrye*, Popl. 191; *Beckwith v. Shordike*, 4 Burr. 2092; *Deane v. Clayton*, 7 Taunt. 489; *Dovaston v. Payne*, 2 H. Bl. 527; *Latch*, 120.

another by human agency, the right of the owner to enter and take them will depend on the manner of their coming there. It may have been by the fault of the owner of the land ; or, of the owner of the goods ; or, equally, of both ; or, of a stranger. In the *first* case, the owner of the goods may lawfully enter and retake them.<sup>1</sup> In the *second* case, he may not. In the *third* case, he may ; if, for example, the cattle of the defendant escaped through a defective partition fence, maintainable jointly by both parties.<sup>2</sup> In the *fourth* case, the owner of the land must be connected with the tort of the stranger, by a demand and refusal ; in which case it becomes his own tort, by subsequent assent. The assent of the plaintiff seems to have been an essential element in the case of *Chapman v. Thumblethorp*,<sup>3</sup> in which a plea in bar to an action of trespass, stating that the defendant's beasts were wrongfully taken by a stranger, and with the plaintiff's assent, driven into the *locus in quo*, into which he entered to retake them, was, on demurrer, held a justification.

It is on these grounds, that we venture to dissent from the opinion, intimated, with more or less strength, by all the learned judges, in the case of *Read v. Smith et al.* We should, on the contrary, maintain, that in a case circumstanced like that, where the goods of one man are, by the uncontrollable force of the elements, and without his fault, carried into the close of another, whether it be his ship, driven high and dry ashore, or his hat blown, by a tornado, into his neighbor's garden, constituting a case of bailment by inevitable necessity, the owner is justifiable in entering to retake his goods. Whether the proprietor of the land may have an action for the damage thus unavoidably done,

<sup>1</sup> *Bro. Abr. Trespass*, pl. 186 ; *2 Roll. Abr.* 565, pl. 9 ; *Houghton v. Butler*, 4 *T. R.* 365.

<sup>2</sup> *1 Dane's Abr.* 134, sec. 13.

<sup>3</sup> *Cro. El.* 329.

the learned judges have not decided, nor do we feel called upon at present to give an opinion.

S. G.

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#### ART. VI.—THE GREATEST-HAPPINESS-PRINCIPLE.

**JEREMY BENTHAM** has long been considered one of the most original and profound thinkers of his own or indeed of any age; and few persons, probably, even of those who would not rank themselves as his followers, will now venture to deny his claim to that appellation. If, however, the character of his mind be analyzed, and the results of his labors be more nearly examined, the judgments of men, who agree in attributing to him great and original powers of thought, will be found to differ widely in their estimate of the value of the services, which, in the eyes of his friends and followers, entitle him to a distinguished position among the benefactors of man.

Mr. Bentham's works place him before the public in a threefold point of view—as a philosopher,—as an exposer of existing evils and abuses in government and laws and their administration,—and as a legislator or legislative reformer. As a philosopher, he had formed an ideal standard of what government and laws should be, predicated upon what he considered the only legitimate purposes of all political and civil institutions;—having examined and tested the existing institutions of his country by this standard, he exposed the evils inherent in them, and the abuses to which they gave rise, with a boldness and acuteness, an honesty and eloquence, of which the world had seen no example, since the days of Martin Luther;—and, in his character of legislator or legislative reformer, he proposed such remedies as he thought necessary to correct the defects in government and laws, which he had pointed out, and to establish in their place his own ideal system of the right and just.

On this side of the Atlantic, Mr. Bentham is probably more known by his "codification proposal," and as himself a codifier, than by any other branch of his labors and writings. But codification, with him, was a means and not an end. He looked to it as the best mode of introducing his legal and political reforms, rather than as being in itself a legal reform. Codification of the laws had been proposed in England, long before his day, by lord Bacon and sir Matthew Hale ; it had been actually executed in three of the most powerful of the states of Europe (France, Austria, and Prussia), before it was suggested by Mr. Bentham ; and the project of the latter met with the opposition of his countrymen, more because of the reforms of which it was to be made the vehicle, than on account of its difficulty or impracticability, or because it was not desirable to reduce the existing system of laws to simplicity and order. Mr. Bentham's character as a codifier, therefore, should be considered as entirely subordinate to his character as a reformer. The strongest advocate of the existing laws might desire to see them put into a better form, without any substantial alteration ; but Bentham would never have troubled himself to concoct and recommend plans of codification, if nothing more than a change or improvement in point of form was to result from their execution. Mr. Lerminier, a philosophical French jurist of the present day, remarks of codes in general, that they are the fruit of political events alone, and are an instrument of power or revolution. "Thus," he adds, "Cæsar, Theodoric, Justinian, Frederic and Napoleon, meditated or instituted codes, in order the better to establish the uniformity and the strength of their government. Thus, also, Bentham, the democratic enemy of the laws of ancient England, is aiming at parliamentary reform and the making of a general code. He is a radical, who demands victory for the arms, which have hitherto rather served the cause of despotism." As already intimated, a

codifier is not necessarily a radical or reformer; nor, on the other hand, is a reformer necessarily a codifier. There is abundant evidence of the first part of this proposition, in the history of ancient and modern codes; and there are certainly many friends of reform and progress, at the present day, who do not regard codification as the only or even as an essential object of their exertions.

The leading principle of Mr. Bentham's philosophy is *utility*, or, as he finally expressed it, *the greatest happiness of the greatest number*. This principle impelled him to investigate and examine existing institutions; it furnished him with a test by which to estimate their value; and he kept it constantly in view as the ultimate object of all his labors. In pursuit of this object, he attempted to unite in himself the characters of a destroyer and of a builder;—two characters, which, though not incompatible with each other, are seldom found to be actively united in the same person. As the faculties of our nature, which lie at their foundation, are separate and distinct, and act separately and at different times, in the individual man, so, in society and in states, they manifest themselves in separate individuals and at different epochs. The necessity for the work of destruction is first felt; and those whose vocation it is present themselves for the task; but, that being accomplished, a new leader and new workmen come forward to the work of renovation. In Bentham, the destroyer predominated over the builder. The old rambling edifice, to which the English law has been so often compared, was hateful to his sight. He saw that the building was not constructed upon any general plan; that it was inconvenient in its arrangement, and had a great many hiding places for knaves and thieves; that it was unequal in its accommodations; and that the expense of keeping up an establishment in it was very great. Repair was out of the question, and the structure must be demolished, to make way for one, which should be more

convenient and useful. But what should be erected in its place? This question required other powers and faculties for its decision, than those which had so readily decreed the destruction of the old edifice; and both were not united in Mr. Bentham. The breaker of idols is not always or necessarily the herald of the true gospel. It does not by any means follow, that he, who can most strongly and clearly point out the practical inconveniences and abuses of an existing institution, is therefore the most competent to suggest a remedy or devise a substitute. Five hundred persons, each with a different plan for reform, might cordially unite in denouncing the abuses or evils of the old system; and, therefore, though we might concur with Mr. Bentham in his opinion of the existing abuses and practical inconveniences of the English systems of law and government, we should not feel ourselves thereby obliged, for the sake of consistency, to agree with him in his proposed substitutes. And this is in some sort our case. We think that Mr. Bentham has succeeded in exposing many of the defects of the English laws, and a vast many abuses in their administration; and, notwithstanding the useful reforms which have recently been effected, principally we believe in pursuance of his suggestions, we are not yet prepared to say, that a thorough reform can be effected, in any other manner, than by entirely remodelling the old system. But here we stop. We do not belong to the utilitarian school of philosophy, even when its leading principle is expressed in the formula of "the greatest happiness of the greatest number;" and, of course, we do not agree with Mr. Bentham, either in his test of the value of existing and proposed institutions, or in the general object which he proposed to effect by his reforms. In short, we do not believe in "the greatest happiness of the greatest number," as a principle of action; nor do we hold it as the ultimate end and object of human government and laws. We are equally at variance with Mr. Ben-

tham in the means by which his reforms are proposed to be effected. These means consist principally in his peculiar mode of codification. But, of this,—though we fully believe in the practicability of “reducing the laws to a written and systematic code,” and though Mr. Bentham’s system has stood much in the way of law reform in this country, because those who have advocated codification have been supposed to do so for the purposes and in the manner proposed by him,—we shall say nothing at present, except to remark, that codification, as it has been executed in many of the modern states of Europe, is somewhat different, both in design and extent from that suggested by Mr. Bentham.

We have made the foregoing remarks, by way of introduction merely to some account of the history and development, in the mind of Mr. Bentham, of the great and leading idea of his philosophy, namely, the greatest-happiness-principle. We shall afterwards examine the principle itself. The formula, in which this idea is expressed,—“the greatest happiness of the greatest number,”—which plays so important a part in the writings of the great philosophical jurist of England, may well be termed world-renowned. We have met with it in most of the languages of Europe, and we daily see it in the writings and hear it on the lips of persons, who would not otherwise be suspected of much sympathy with the greatest number, except when it happened to be identical with a political majority. The history of this phrase is somewhat curious, and, for the purpose of presenting it to our readers, we shall avail ourselves of the supplementary chapter to the first volume of the *Deontology*, compiled from Mr. Bentham’s papers, and published since his decease, by his friend and executor, Mr. John Bowring.

When the principle, expressed in the above formula, first presented itself to Mr. Bentham’s mind, he denominated it the *utilitarian* theory, on the ground, that any thing is use-

ful only in as far and in as much as it promotes the happiness of man. Happiness being the end and object in view, every thing which tended to promote it was useful, and the science of the useful, therefore, was the science of the means of happiness. But, in common language, any thing which tends to a particular end is useful to that end, whatever it may be, whether good or bad ; and, consequently, the word *utility* did not always and to every reader convey the idea, with which Mr. Bentham connected it in his own mind. Notwithstanding this equivocal signification of the term *utility*, he continued to make use of it in his writings, from 1776 to 1822, when he substituted for it the phrase, “ the greatest happiness of the greatest number,” in his codification proposal, published in the last named year. He had been gradually becoming dissatisfied with the *utilitarian* phraseology, and was finally induced to discard it, as we infer from the statement of Mr. Bowring, by an observation made to him by lady Holland, who told him that his doctrine of utility put a veto upon pleasure. It was clear, therefore, that the word utility not only failed in communicating to other minds the ideas which Bentham attached to it, but that to some, it conveyed ideas wholly different and opposed to them.

Our readers will perhaps be surprised to learn, that the formula of the greatest-happiness-principle did not originate with Mr. Bentham. Such, however, if the statement of Mr. Bentham himself is to be relied on, is the fact. Its author was the no less celebrated Dr. Priestly, who, in his essay on government, published in 1768, as we are informed by Mr. Bowring, introduced in italics, as the only reasonable and proper object of government, *the greatest happiness of the greatest number*. Mr. Bentham’s account of his first meeting with this phrase is too curious not to be inserted at length. He seems almost to have supposed, that there was something providential, at least, if not miracu-

lous, in the circumstances which threw Dr. Priestly's pamphlet in his way. We quote from the chapter of the Deontology above alluded to. The language is Bentham's, taken from his lips, says Mr. Bowring, "when he was talking over with the writer what he called the adventures of the greatest-happiness-principle, its parentage, birth, education, travels and history."

" Some how or other, shortly after its publication, a copy of this pamphlet [Dr. Priestly's] found its way into the little circulating library belonging to a little coffee-house, called Harper's coffee-house, attached, as it were, to Queen's College, Oxford, and deriving, from the popularity of that college, the whole of its subsistence. It was a corner house, having one front towards the high street, another towards a narrow lane, which on that side skirts Queen's College, and loses itself in a lane issuing from one of the gates of New College. To this library, the subscription was a shilling a quarter, or in the university phrase, a shilling a term. Of this subscription, the produce was composed of two or three newspapers, with magazines one or two, and now and then a newly-published pamphlet; a moderate sized octavo was a rare, if ever exemplified spectacle: composed partly of pamphlets, partly of magazines, half bound together, a few dozen volumes made up this library, which formed so curious a contrast with the Bodleian Library, and those of Christ's Church and All Souls !

" The year 1768 was the latest of the years, in which I ever made at Oxford a residence of more than a day or two. The motive of that visit was the giving my vote, in the quality of master of arts, for the university of Oxford, on the occasion of a parliamentary election; and, not being at that time arrived at the age of twenty-one, this deficiency in the article of age might have given occasion to an election contest in the house of commons, had not the majority been put out of doubt by a sufficient number of votes not exposed

to contestation. This year, 1768, was the latest of all the years in which this pamphlet could have come into my hands. Be this as it may, it was by that pamphlet, and this phrase in it, that my principles on the subject of morality, public and private together, were determined. It was from that pamphlet and that page of it, that I drew the phrase, the words and import of which have been so widely diffused over the civilized world. At the sight of it, I cried out, as it were in an inward ecstacy, like Archimedes, on the discovery of the fundamental principle of hydrostatics, *Εὐφημία*. Little did I think of the correction, which, within a few years, on a closer scrutiny, I found myself under the necessity of applying to it." *Deontology*, vol. i. p. 298.

It is very probable, that Mr. Bentham may have taken the idea, which he afterwards embodied in the formula of the greatest-happiness-principle, from the work alluded to of Dr. Priestly. But we have carefully examined that work, both in the edition of 1768, and in the second with additions published in 1771, and have been wholly unable to find the "page" and the "phrase," the sight of which awakened such an "inward ecstacy" in the mind of Mr. Bentham. The following sentence of Dr. Priestly expresses very nearly the idea of "the greatest happiness of the greatest number," but not in the axiomatic form, which seems to have given that phrase so powerful a hold upon the imagination of its distinguished promulgator.

"It must necessarily be understood, therefore, whether it be expressed or not, that all people live in society for their mutual advantage; so that the good and happiness of the members, that is, the majority of the members of any state, is the great standard by which every thing relating to that state must finally be determined. And though it may be supposed, that a body of people may be bound by a voluntary resignation of all their interests (which they have been so infatuated as to make) to a single person, or to a few, it

can never be supposed, that the resignation is obligatory to their posterity ; because it is manifestly *contrary to the good of the whole that it should be so.*" p. 17.

The words italicized are the only ones which are so printed in the sentence above extracted from Dr. Priestly, and they certainly do not import the greatest-happiness-principle. The phrase in the preceding part of the sentence, that "the good and happiness of the members, that is, the majority of the members of any state, is the great standard by which every thing relating to that state must finally be determined," comes much nearer to it, though it is not exactly identical. It is evident, that Dr. Priestly himself meant nothing more by this language than simply the *public good*, for he adds :

"I own it is rather matter of surprise to me, that this great object of all government should have been so little insisted on by our great writers who have treated of this subject, and that more use hath not been made of it. In treating of particular regulations in states, this principle necessarily obtruded itself; all arguments in favor of any law being always drawn from a consideration of its tendency to promote the public good ; and yet it has often escaped the notice of writers in discoursing on the first principles of society, and the subject of civil and religious liberty." p. 17.

The only principle, that we can find advanced in this work of Dr. Priestly's, in the form of an axiom, is the following, which, though based upon the fallacy of an original social compact, is nevertheless quite true as an abstract proposition. It cannot, however, be the sentence which awakened such a degree of enthusiasm in the mind of Mr. Bentham.

"The sum of what hath been advanced upon this head, is a maxim, than which nothing is more true, that *every government, whatever be the form of it, is originally, and antecedent to its present form, an equal republic* ; and, con-

sequently, that every man, when he comes to be sensible of his natural rights, and to feel his own importance, will consider himself as fully equal to any other person whatever." p. 41.

Mr. Bentham, as we have seen, supposed Dr. Priestly to be the author of the phrase, "the greatest happiness of the greatest number;" but, from what is above stated, it seems to us more likely, that he is only indebted to that writer for a suggestion of the idea, and that his own imagination gave it the form of an axiom. So much for the history of the greatest-happiness-principle. We proceed now to analyze and examine it.

Government is nothing more nor less than society organized in such a manner as to be able to act as one body; and, in considering society in this point of view, three questions present themselves, namely: 1, for what shall society act, or what is the object of government?—2, when shall it act, or when are the conditions present, which require the interference of government?—and, 3, how shall society act, or in what manner is its will to be ascertained? These three questions are all answered, or supposed to be so, in the maxim or formula of "the greatest happiness of the greatest number;"—thus, the happiness of the members of any society should be the object of its government,—which should act when the happiness of a majority of its members demands it,—and by means of the votes or proceedings of that majority. We propose to examine the greatest-happiness-principle, as analyzed into its separate elements, corresponding to the answers above indicated.

I. What is the object of government, or, for what shall society act? The maxim answers, happiness. The only objection to this part of the principle is its vagueness. Considering that it is put forward as a practical principle, to be kept constantly in view, and applied by the legislator, it is singularly defective in its capability of application. To the

mind of Mr. Bentham, who had made out a complete schedule of all the pleasures which he supposed constituted human happiness, and of their corresponding pains, it is conceivable, that his favorite maxim should have been, what he designed it to be for others, a practical principle. But, when we reflect, that very few persons are probably agreed, either with Mr. Bentham or with one another, as to what constitutes happiness, we shall come to the conclusion, that the greatest-happiness-principle is hardly susceptible of any other practical application, than one which resolves happiness into the absolute and entire freedom of each individual to do precisely what he pleases. And those who would not agree in any thing else would probably agree, that happiness did not and could not consist in this entire freedom of the individual from contemporary restraint and the future consequences of his actions. Whilst men, therefore, are at variance with one another, as to what constitutes happiness, it seems to us to be of little practical use to put it forth as the great object of human government and laws.

We do not agree, however, that the happiness of the individuals composing a state, is or can be the object of its government, in any other than a very general and remote sense, very much as we might say, that the eternal welfare of the citizen is the only proper object of government. It is not in the power of society or government to confer happiness. So far from this, government cannot even confer the means of happiness. The most it can do is to aid individuals in obtaining happiness, by securing to them the use of the external means upon which its existence depends. In the words of the preamble to the constitution of Massachusetts, government can only "furnish the individuals who compose it with the power of enjoying in safety and tranquillity, their natural rights and the blessings of life." If the maxim, therefore, had taken "the greatest means of happiness" instead of "the greatest happiness," as the

object of government and laws, it would have been altogether more true and practical, and, at the same time, would have lost nothing of its axiomatic form.

It may perhaps be said, that the means of happiness is quite as vague and uncertain in its signification, as the term happiness. But this is not the case. The happiness of an individual, whatever it may consist of, depends upon two things, namely, the external means, or those which are independent of himself, and the internal, or those which are peculiar to him. Now, over the latter, government by its very nature can have but little if any influence, inasmuch as it cannot control or direct the natural inclinations or faculties, so as in fact to change one individual into another.<sup>1</sup> Government can only control and modify the external means of happiness. These means are the objects of sensual perception and lie open before every body; they are matter of daily observation and experience; and, though we may not be able to say, with any certainty, that this or that particular thing or combination of things is desirable above all others to a particular individual, yet, we are not likely to have much difficulty, in agreeing in the aggregate upon almost if not quite all the things, which constitute the external means of happiness. By substituting the means of happiness, therefore, for happiness, and limiting the object of government to those means which are external to the individual, it seems to us, that we have gone a great way towards obtaining a rule, much more susceptible of practical application, than the one which we are examining. But we need

<sup>1</sup> We hope we shall not be understood, in the above language, to mean, that government can exert no influence upon any but the *physical* means of happiness. The intellectual and moral faculties of our nature, as well as our animal propensities, have the appropriate means of their development and exercise in the external world; and, over those means and through them, society may and does exercise its power, in the same manner and to a similar extent, that it exerts an influence upon physical nature.

not stop here. Having taken this first step, it is practicable to go much further, and even to designate, with a considerable approximation to exact certainty, the precise things and the proper proportion of each, which it should be the object of society to secure to its individual members.

It is the purpose of society, and consequently of government, to aid man in the accomplishment of his destiny as such, that is, to enable him to be man ; and this can only be effected, by the development and exercise of those faculties, whereby he is a man. The appropriate means for this developement and exercise exist in the external world ; and the proper use of these means, in developing and exercising our faculties, constitutes the only element of human happiness, which, in its nature is susceptible to the influence of government. The nature and functions of the different faculties are now ascertained with as much precision and certainty, as any other subjects of natural science. Each of the faculties requires the appropriate means of its development and exercise, and each must be developed and exercised in harmony with all the others. The animal propensities, the moral sentiments, and the intellectual powers of man, have their several appropriate spheres of action ; in order that man may accomplish his destiny, all these classes of faculties must be developed and exercised ; and, in order that each class and each faculty may receive that degree of development and exercise, which the perfection of its functions requires, none of them must be cultivated to the neglect of the others. To this end, it is necessary, that man should live in society, inasmuch as all his faculties suppose his existence in that state, and some of them have the various relations of society for their especial functions. Society, acting as such, constitutes government.

We are now better prepared to say, what is the proper object of government and social institutions. It is, simply, to enable each individual member of the society to obtain

for himself all the external means of developing and exercising the faculties by which he is man, each within its appropriate sphere, in its appropriate manner, and in harmony with all the other faculties. This object is to be obtained partly by positive provisions, but principally by restraining each individual in the exercise of his own faculties, in such a manner, that he shall be compelled to leave to all other individuals, the free, equal, and appropriate exercise of theirs. We might go on and enumerate the various faculties, and determine the duty or the right of government in reference to each; but this would be to write a treatise on natural law; whilst our only object, at this time, is to show the inadequacy of the leading idea of the Benthamic philosophy, as a practical principle; and this we conceive we have now done, so far as that principle professes to ascertain the great object of government.

II. When shall society act, or when are the conditions present, which require the interference of government? Mr. Bentham answers, when the greatest happiness of the greatest number demands it. But, inasmuch as it cannot be determined *a priori* whether any proposed measure will actually produce the greatest happiness of the greatest number, this answer clearly amounts to nothing more than saying, that society should act whenever the greatest number of its members are of opinion, that their greatest happiness will result from the proposed action; and, therefore, that when a majority of the individuals composing a society shall each be of opinion, that his individual pleasure or happiness requires a particular thing to be done, the society ought then to do that thing. The action of society, whenever it prescribes a rule of conduct to its members, constitutes the law of that society, obligatory on all its members, and, so far as man can authoritatively proclaim it, what is right and just. The principle of Mr. Bentham, therefore, makes the opinions of a majority of the members of a state, synonymous with

the right and just. Whatsoever the majority wills, that is the right.

The fallacy of the greatest-happiness-principle, in the point of view in which we are now considering it, consists, first, in substituting happiness for the means of happiness, as the test by which the individual members of society are to determine the character of any proposed measure; and, second, in fixing the number of those whose happiness or whose means of happiness is to be promoted by social action. We have already sufficiently remarked upon the mistake of considering happiness rather than its means, as the object of human government. It is only necessary to add, in this place, that, if the views already presented are correct, each individual, in his participation in the functions of government, should not ask himself whether a given measure will be a personal gratification to him, but whether it will contribute to that development and exercise of the human faculties, which are essential to the progress of man in the accomplishment of his destiny. If personal gratification be the legitimate object of legislation, and the test of what is right and just, then it will follow, that the doing of that, which in an individual would be considered as a most heinous crime, may, without changing its character in the least, become right and just and even a duty, as soon as the greater number of the individuals composing a state, participate in the desire to do it.

The greatest-happiness-principle is fallacious also in fixing the number, whose happiness or means of happiness is to be consulted; and, it is to this point, that Mr. Bentham alludes, when he speaks of the correction, which, within a few years, on a closer scrutiny, he found himself under the necessity of applying to it. We shall give Mr. Bentham's own language, in reference to his change of opinion, in another part of this article. According to the principle of the greatest happiness of the greatest number, society is not

to act, until the greatest number demands action to promote their happiness. Now, assuming that the happiness of the individuals composing a society is the object of its government, is it not the duty of the latter to promote the happiness of each individual who is subject to it? The greatest-happiness-principle itself answers in the affirmative. But why then should society wait until the happiness of the greatest number is involved, before it acts? If the happiness of a single individual requires action, and the happiness of others will not be diminished thereby, why should not society act in favor of that individual? But, if the principle be understood literally, nothing can be done for him, however unfortunate may be his situation, until one half at least of the remainder of the society excluding himself, becomes as miserable as he is, and then the greatest happiness of the greatest number being involved, society acts. Perhaps, however, it will be said, that the principle is not intended to be understood literally, and, that a proper case for the action of government is made out, when the happiness of one individual requires its action, and the happiness of one half at least of the remaining members is not adversely involved. But, if this be so, then, inasmuch as in the greater number of instances, in which government acts either directly or indirectly, it acts for the benefit of individuals or of numbers less than a majority, it seems to be little better than idle to put forth as a practical principle, one which requires to be construed contrary to its literal meaning, in at least nine cases out of ten, in which it receives an application.

The following example will serve to illustrate what we have above stated. The inhabitants of the island of Nantucket find their happiness in some degree affected, by reason of the oyster beds in their waters being plundered by strangers from a distance; and they demand of the legislature an act to protect them against these aggressions. This is a matter, in which the greater part of the citizens of Massa-

chusetts cannot possibly have any direct interest, and, in which, their happiness cannot, strictly speaking, be at all concerned. The greatest happiness of the greatest number, as we commonly understand the term happiness, is evidently not at stake; and, of course, nothing can be done, unless the required condition of legislative action can be made to exist. It would be somewhat difficult, however, to get a majority of the citizens to become interested in the oyster fishery of Nantucket, and so the terms of the condition are to be complied with, by the fiction of supposing that the direct happiness brought into the scale by the people of Nantucket may be enlarged to the requisite amount, by the indirect happiness which will result to a great many other worthy and good citizens of Massachusetts, from seeing the wishes of their Nantucket friends so happily accomplished.

If the latter be the true construction, it shows that Mr. Bentham attached very vague notions to the term happiness, and, in short, made it synonymous with mere individual pleasure; but, if not, it proves that his practical principle is not susceptible of application, in a vast many cases, where, nevertheless, we feel that it is the duty of society to act. It is evidently the duty of government to act for the benefit of a single individual, or of any number of individuals less than a majority, when the interests of others, in the administration of the government, will not be thereby injuriously affected.

But, according to the greatest-happiness-principle, society must not only decline to act, when the happiness of any number less than a majority is to be promoted; it must act, at all events, when the happiness of the greatest number of the individuals composing it demands action. This part of the maxim is no less fallacious than that which we have just considered. If, by the other part of the maxim, the happiness of all the individuals composing the society less than a majority is to be neglected, because society cannot

act, until the happiness of the greatest number demands action; so, on the other hand, by this part of it, the happiness of all less than a majority is to be sacrificed, whenever the happiness of a majority demands it. If the first consequence be wrong, the second is not less so, and for the same reasons. If the happiness of a single individual or of any number less than a majority ought to be consulted, when that happiness would not interfere with the happiness of others; so, the happiness of a majority ought not to be consulted, at the expense of the happiness of the minority or of any single individual.

An extreme case, but one not perhaps very unlikely to happen, either in a municipal or national democracy, may be put, which will illustrate the degree of oppression, to which Mr. Bentham's rule may give occasion, in its practical application. Suppose a community consisting of 1001 persons, 501 of whom are in favor of and 500 opposed to a given measure. The happiness of each one of the latter will be as much diminished, as that of each one of the former will be promoted, by the proposed measure. But the greatest happiness of the greatest number must prevail, and that of the 500 is sacrificed to that of the 501. What now is the result to the happiness of the community of 1001 members? The measure has made 501 happy, and 500 unhappy, precisely in the same proportion; the unhappiness of the latter (in estimating the amount of happiness of the whole community) may be set against the happiness of 500 of the former; and, thus, we have the happiness of a single individual as the result. This is the view, which Mr. Bentham himself ultimately took of the operation of the greatest-happiness-principle. "In the later years of his life," says Mr. Bowring, "the phrase, *greatest happiness of the greatest number*, appeared, on a closer scrutiny, to be wanting in that clearness and correctness, which had originally recommended it to his notice and adoption. And these are

the reasons for his change of opinion, given in his own words :”—

“ Be the community in question what it may, divide it into two unequal parts ; call one of them the majority, the other the minority ; lay out of the account the feelings of the minority ; include in the account no feelings but those of the majority ;—you will find, that to the aggregate stock of the happiness of the community, loss, not profit, is the result of the operation. Of this proposition, the truth will be the more palpable, the greater the ratio of the number of the minority to that of the majority ; in other words, the less the difference between the two unequal parts ; and suppose the undivided parts equal, the quantity of the error will then be at its maximum.

“ Number of the majority, suppose 2001, number of the minority, 2000. Suppose, in the first place, the stock of happiness in such sort divided, that by every one of the 4001, an equal portion of happiness shall be possessed. Take now from every one of the 2000 his share of happiness, and divide it any how among the 2001 ; instead of augmentation, vast is the diminution you will find to be the result. The feelings of the minority being, by the supposition, laid entirely out of the account (for such, in its enlarged form, is the import of the proposition), the vacuum thus left may, instead of remaining a vacuum, be filled with unhappiness, positive suffering, in magnitude, intensity, and duration taken together, the greatest which it is in the power of human nature to endure.

“ Take from your 2000, and give to your 2001 all the happiness you find your 2000 in possession of : insert, in the room of the happiness you have taken out, unhappiness in as large a quantity as the receptacle will contain : to the aggregate amount of the happiness possessed by the 4001 taken together, will the result be net profit ? on the contrary, the whole profit will have given place to loss. How so ?

because, so it is, that such is the nature of the receptacle, the quantity of unhappiness it is capable of containing, during any given portion of time, is greater than the quantity of happiness.

"At the outset, place your 4001 in a state of perfect equality, in respect of the means, or say, instruments of happiness, and, in particular, power and opulence; every one of them in a state of equal liberty; every one independent of every other; every one of them possessing an equal portion of money and money's worth; in this state it is that you find them. Taking in hand now your 2000, reduce them to a state of slavery, and, no matter in what proportions of the slaves thus constituted, divide the whole number with such, their property, among your 2001; the operation performed, of the happiness of what number will an augmentation be the result. The question answers itself.

"Were it otherwise, note now the practical application that would be to be made of it in the British isles. In Great Britain, take the whole body of the Roman Catholics, make slaves of them, and divide them in any proportion, them and their progeny, among the whole body of the Protestants. In Ireland, take the whole body of the Protestants, and divide them, in like manner, among the whole body of the Roman Catholics." *Deontology*, vol. i, p. 328.

From these extracts, we learn the idea which Mr. Bentham attached to the word happiness, which he evidently considered as synonymous with the mere personal gratification of the individual, whether founded in right or not; and we learn also, that it was the possible practical operation of his principle, understood in that manner, that led him to discard it, as wanting in clearness and certainty. If we recur now to the distinction, which we have already drawn, between happiness and the means of happiness, and to the principle which we have established, as the only legitimate object of government, namely, the securing of each indi-

vidual of the society in the external means necessary to the development and exercise of all his faculties as man, we shall come at once to the conclusion, that the supposed happiness or gratification of the greatest number can never rightfully be consulted, when such gratification will interfere with the free, equal, and appropriate exercise of the faculties of the minority or of any less number, even if it be but a single individual. We should therefore rectify the form of the greatest-happiness-principle, if we thought it desirable to express the whole object of government in a single phrase, and, instead of "the greatest happiness of the greatest number," we should say, "the greatest happiness of the whole." Whatever may be the power of the majority, of which we shall speak immediately, we cannot doubt, that it has no moral right, to consult the gratification of the individuals who compose it, in any other manner, than one which allows to each individual of the community, be he never so humble, perfect and entire freedom to seek and obtain, in an equal degree, with all his fellow citizens, all the external means of happiness.

III. The third question which we proposed to examine is, by what mode or in what form shall society manifest its action? Mr. Bentham's maxim answers, by means of the votes or suffrages of a majority of its members, freely, deliberately, and solemnly given. In this answer we perfectly agree; and, this, we apprehend, is all that Mr. Bentham originally had distinctly in his mind, or intended to express by the phrase which we have so often quoted. The same idea is probably all that is intended to be expressed by Dr. Priestly, in the sentence quoted from his essay on government, namely, that "the good and happiness of the members, that is, the majority of the members of any state, is the great standard by which every thing relating to that state must finally be determined." The following passage, (and it is not the only one of the same tenor), shows conclusively,

that he did not look upon the will of the majority as constitutive of right.

"Civil liberty has been greatly impaired by an abuse of the maxim, that the joint understanding of all the members of a state, properly collected, must be preferable to that of individuals; and, consequently, that the more the cases are, in which mankind are governed by this united reason of the whole community, so much the better; whereas, in truth, the greater part of human actions are of such a nature, that more inconvenience would follow from their being fixed by laws, than from their being left to every man's arbitrary will." p. 52.

Dr. Priestly admits, that "there is a real difficulty in determining what general rules, respecting the extent of the power of government, or of governors, are most conducive to the public good," and he accordingly does not attempt to draw the line very accurately. Assuming, however, the basis of the social compact, he lays it down, that men are not led to wish for a state of society, by the want of any thing, that they can conveniently procure for themselves, but by the desire of receiving such assistance as *numbers* can give to *individuals*; and, that in entering into society, they do not by any means seek that assistance which *numbers*, as such, cannot give to *individuals*, and, least of all, such as *individuals* are better qualified to impart to *numbers*. If he had followed out this idea, namely, that the only object of government is to furnish *individuals* with that assistance, in the business of life, which *numbers* can give to *individuals*, he would probably have come very near to the principle, which we have announced as the true and legitimate object of government. He adds, that the great difficulty concerning the due extent of civil government lies in distinguishing the objects, in reference to which *numbers* cannot give assistance to *individuals*, or in reference to which *individuals* are better qualified to impart assistance to *numbers*. "Little

difficulty, however," he concludes, "has, in fact, arisen from the nature of the things, in comparison of the difficulties that have been occasioned by its being the interest of men to combine, confound, and perplex them." It is perfectly clear, therefore, that Dr. Priestly did not intend to sanction the principle, that whatsoever the majority wills is right.

We have already shown the fallacy of putting forth the pleasure of a majority as the object of government, and of making the will of a majority the condition of social action, or, in other words, the test of what is right and just. But, though we cannot consider the will of a majority as synonymous with right; we are nevertheless constrained to say, that we consider it the nearest practicable approximation to right, which society is capable of at any given time; and, that, as such, it must stand in the place of right, until the right can be made to prevail, by the same means of a majority. In the practical administration of affairs, too, we believe that the deliberate opinion of a majority, in reference to a subject of common concern, is much more likely to be right, in a given number of cases, than the opinion of any other numerical portion of society. But however this may be, there is no other practicable mode of social action, under any form of government, which looks to the progress of man as its ultimate object. It may be thought, perhaps, that we are likely to gain but little if any thing, by denying that the will of the majority makes right, while we admit, that, right or wrong, it must nevertheless prevail. But we think otherwise. If the individuals composing a state shall become convinced, that they are not relieved from their individual responsibility, while they participate in the functions of government, and this will be the case, when they perceive that there is a higher principle to be looked to, than the mere pleasure of the greatest number, we shall have made the same progress in the social state, that we make in the char-

acter of the individual man, when we have convinced him, that he is subject to a rule of action higher than the mere impulses of his nature, and to which those impulses must be submitted. Society, as well as the individual man, may pursue the impulse, disregarding the rule of duty, and, in both, the consequences of disobedience will inevitably follow. In both cases, the penalty must be paid ; but, in neither, does it always or often fall exclusively on the head of the actual offender. The consequences of the neglect of the moral law, in an individual, are seldom, perhaps never, confined to himself ; his children or others connected with him come in for their share. So, too, the consequences of a similar disobedience, in a state, fall upon the same state, indeed, but not upon the individuals, by whom, acting in their social capacity, the offence was committed. History proves, that nations, no less than individuals, are morally responsible beings, whether they be of the monarchical, aristocratic, or democratic form. But the doctrine, that the will of the majority is the absolute test of right, would relieve nations from all responsibility, except that of acting by a major vote, and would also furnish an insuperable barrier against all improvement.

In this country, it may seem to be a work of mere supererogation, to undertake a formal defence of the principle, commonly expressed in the phrase, that it is the right of the majority to govern ; and, yet, in this respect, we are inclined to believe, that our practice is ahead of our theory, or, to speak more intelligibly, that, as in many other things, in reference to which we act rather from the instinctive feeling of the mass, than from any theory established before hand, we are doing right without precisely knowing the reasons why. If, by explaining what seem to us to be some of the chief reasons, on which the practical administration of our government rests, we can thereby reconcile some persons to it, who affect to hold popular institutions in contempt, and

awaken some others to a sense of their duty as citizens; we shall be entirely willing to incur the reproach of having undertaken to prove what no one seriously doubts.

The object of government, as we have already said, is to secure to each individual the means of developing and exercising those faculties whereby he is man; this development and exercise require as a condition the existence of society; and society in a state of organization as such is government. We have also said, that all the faculties of man require to be developed and exercised, each within its appropriate sphere, and in harmony with all the others; and that all of them suppose the existence of, and some of them have for their special functions, the various relations of society. It follows from these considerations, that it is the duty of each individual member of society to act as such, as well as to act in his individual capacity; and, consequently, to participate in all the functions of social government. The progress of society and of the individual depend upon each other; the impulse must commence in the individual; but neither can go ahead alone and of itself; and, in the work of advancement, they exercise a reciprocal influence. This necessary participation of the individual in the functions of government can only take place under that form, which admits every one to the right and thus imposes upon every one the duty of suffrage; and, wherever the government is administered by means of the suffrages of all the citizens, the majority principle is necessarily admitted.

If the views just stated are correct, no man can divest himself of his social responsibility, by refusing to participate in the functions of social government, any more than he can divest himself of his individual responsibility, by retiring within the walls of a convent. It follows, too, from the same premises, that each individual of the society has a right to demand of every other, that, according to his ability, he shall participate in the functions of government; at

least, so far as to inform himself and to give his vote on all occasions when called upon to do so. Civil freedom may be said to consist in the absence of every restraint, except that which we voluntarily impose upon ourselves; and, that society, in which there is no restraint but what results from the deliberate will of all its members, possesses the most perfect civil freedom, of which it is at any given time capable. According to this rule, the civil freedom of any state will be imperfect, precisely in proportion to the number of its members, who refuse or neglect to perform their duties as citizens. Every member, therefore, who neglects to participate in the functions of government, does all that lies in his power, to bring every other member under the subjection of a power, to which he does not as a member of society voluntarily subject himself, namely, to the will of any less number than a majority of the whole body; and this is nothing more or less than despotism; so, that the greatest tyrant, in a free republic, is he who most neglects to perform his duties of a citizen.

We have thus seen, that every citizen is under a moral obligation to the rest of his fellow citizens, to take a part in the concerns of government; and, it requires no argument to show, that the self-interest of every one is deeply involved in the performance of all his moral duties. But, each member of society is also under an obligation to every other, to promote his well-being in every respect, according to the great precept of christianity,—“love thy neighbor as thyself;”—and a very slight consideration will teach us how powerfully the performance of this class of duties is enforced by the majority principle. In the functions of government, this principle recognises the absolute equality of men. Every man, be his character or property what they may, is fully equal to every other. In voting, the wisest and best have but a single suffrage; and the ignorant and wicked have the same; so that the former, if they would

exert a greater influence, than that of merely giving their vote, must do so primarily upon the understandings and characters of their fellow citizens, rather than by any direct interference in government. Would we have the government wisely and virtuously administered? We must bear in mind, that its officers are of ourselves, and simply what we make them; that the government is not a thing apart and separate from the people; that, precisely in proportion to the wisdom, goodness, and intelligence of those of the people, who participate in its functions, will be the character of its administration; and, consequently, that the only mode, by which we can introduce our own wisdom and virtue into the national councils, is, not by proclaiming ourselves wiser and better than our neighbors, and demanding a corresponding deference for our opinion, but by making our neighbor as wise and as good as we are. This is the only mode, by which the aristocratic principle can be rightfully exerted in our government. The majority principle, therefore, if it cannot compel every man actually to love his neighbor as himself, does at least impress upon every one the absolute necessity of doing what is very nearly equivalent, namely, of making every other man, by his example, his sympathy, his kindness, and his instruction, as wise and as good, and consequently as safe a person to be entrusted with the functions of government, as he is himself.

In short, the principle of the Anglo-Saxon institution of franc-pledge, by which the freeholders of England were made sureties or free pledges to the king for the good behavior of each other, is more than revived in the modern Anglo-American system of free suffrage; but, with this difference, that, by the law of Alfred, the freeholders of the tithing were only bound, in case any offence was committed within their district, to have the offender forthcoming; whereas, by the operation of universal suffrage, each citizen is actually compelled to bear his share of the punishment,

which inevitably follows the neglect or abuse of any political right, by his fellow citizens.

If some of our citizens, who complain that wisdom and goodness have not their due influence in the government, (and there are many such), would mingle more with their fellow citizens as equals and friends, and strive to instruct and improve them, according to the measure of their ability, they would find that human nature is every where the same, and that the humble and ignorant would receive their teachings with profit to themselves and thanks to their benefactors. Or if such should not prove to be the result, they would at least have better ground than they now have for complaining. These complaints are heard chiefly in the mouths of those, who, by the blessing of providence, upon their own or their ancestors' labors, are relieved from the necessity of coming much in contact with that portion of society, by whom the active business of life is conducted. How honorable would it be in such, to make use of their leisure in the improvement and instruction of their fellow men, instead of spending it in mere indolence or in their own personal and selfish gratification. Let these complainers have a little less confidence in themselves, and a little more in human nature; let them show themselves to be the brethren and friends of their race, before they pronounce that men are deaf to the claims of justice and benevolence; and let them do what is in their power to make others virtuous and wise, before they complain of them for being ignorant and depraved.

There is another class, who can only be taught their duty as citizens and forced into its performance, by being occasionally made to feel the operation of the majority principle. These are the selfish and indolent, who seem to look upon government as a piece of machinery, which, being occasionally wound up, say, once in a century or two, will then run on and perform its functions, till it is worn out, without any

further agency on the part of the people. These complainers consider a government that will go alone,—a sort of perpetual-motion-government,—as the great desideratum in political science; and they accordingly regard our own, with all its multitudinous calls upon the citizen to vote and act, as the most troublesome and inconvenient form in the world. Knowing little and caring less about the true functions of government, their only desire is to be relieved from taking any part in its administration. Forgetting their duty as citizens, it is not to be wondered at, that their claims as such are sometimes forgotten by others. Nothing can so effectually awaken these men to a sense of their duty, as the feeling that their interests are sometimes disregarded in the operation of the majority principle.

The great objection to the majority principle is expressed in the question,—what security have we that the decision of mere superior numbers will be right? and this question we shall now attempt very briefly to answer. In the first place, however, and as a preliminary, we must be agreed as to that, for the attainment of which we desire security. Right is what we seek in the decision of the majority; not that which is absolute, but only in that relative degree, which is attainable by man. We desire that the decision, by whomsoever pronounced, should be as near right, as human beings are capable of attaining. This being premised, let us inquire what means we have at command, wherewith, in the first place, to secure a correct decision, or, in case of a wrong decision, to control and correct it. The best security, which it is possible to have, consists in the integrity and ability of those, by whom the decision is to be pronounced; the next best is that which is derived from the consciousness on the part of those who decide, that their opinion is subject to the revision of a higher tribunal. The latter is the kind of security to which the objection refers.

There are two kinds of higher tribunals, to whose decision we may look, and to one of which we must ultimately look, for the correction of human decisions. These are the cotemporaneous and the future. The first are superior tribunals existing at the same time with that whose decision is to be corrected, and by which that decision is revised and abrogated or changed, to make it conform to right. If we desire a similar security for the correctness of the decision of the appellate tribunal, we institute a third, to which we may have recourse for that purpose; and so we may go on, through all the various conceivable forms of cotemporaneous responsibility. The last decision, however, must be acknowledged as right, for the time being. From the decisions of ever so many cotemporaneous tribunals, the ultimate and final appeal must be made to the second kind of superior tribunal, the future. This judges of the act in question, not by the light and knowledge and under the influence of the prejudices of the same period, but by the improved standard of an advancing age, and free from the impediments to sound and correct cotemporary judgment. This last tribunal is the present, eternally and every where sitting in judgment on the past; in every country and under every form of government, its judges are the people; and their judgments are recorded in public opinion. This is the security, to which we must ultimately look, for the correctness of the decision of majorities; and this security has been hitherto found as effectual and perfect, as is attainable by man in his present state.

In the foregoing remarks, on the character of the mind and labors of the late Mr. Bentham, we do not intend to depreciate the services, or disparage the fame, of that extraordinary man. If any thing can contribute to extend a knowledge of the former, or to add to the latter, it will be a thorough analysis and discrimination, such as we have partially presented in the beginning of this article. The views,

which we have taken of the greatest-happiness-principle, are similar, in one respect at least, to those which Mr. Bentham himself finally embraced, and which led him to discard the maxim of "the greatest happiness of the greatest number," as wanting in that clearness and correctness, which had originally recommended it to his notice and adoption. We cannot but marvel, however, that the determined enemy of all cant, should have himself been guilty of the same submission to a cant phrase, which he so strongly reprobated in others.<sup>1</sup>

L. S. C.

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#### ART. VII.—BIOGRAPHICAL SKETCH OF JOSEPH DUDLEY.

JOSEPH DUDLEY was for a while chief justice of the superior court during the administration of governor Andros. He was the son of Thomas Dudley, governor of the Massachusetts colony, and was born July 23, 1647, when his father was seventy years of age. His mother afterwards married the Rev. Mr. Allen, of Dedham, under whose care he passed the early years of his life, till his admission into college. He was graduated at Harvard in 1665, and was educated for the ministry. His ambitious views rendered him unwilling to devote himself to the duties of that profession, and he accordingly abandoned it for a public life. He was a representative in the general court from Roxbury, from 1673 till 1675. The following year he was chosen an assistant, and continued to be re-elected to that board till 1685. In 1681 he was chosen, with Mr. Richards, agent of the colony. The colony charter was in danger of being lost through the

<sup>1</sup> "Man calls himself a rational animal, and thus it is he is governed. To govern a camel, the Arabs put a hook into his nose: to govern a man, you sound a cant phrase in his ear; *church, liberty, equity, jury*: and with this the animal with the two legs is led or drawn as you please." *Rationale of Judicial Evidence*, vol. iv. p. 349.

machinations of Randolph, and a last effort was made to preserve it by a direct appeal to the crown. The political parties in the colony, however, were divided in regard to the policy which ought to be pursued, in view of this threatened loss, and not a few, among whom was the celebrated Elisha Cooke, were opposed to taking any measures which could be construed into a surrender to the king of a right to control the charter at all, unless the same had been violated. Dudley belonged to the opposite or prerogative party. The agency proved unsuccessful, and the charter was vacated against law, and even with scarcely the forms of justice.

The embassy to England was not however lost to Dudley. He ingratiated himself with Randolph, and was successful enough to procure a commission as president of Massachusetts and New Hampshire. He had in the mean time so far lost his popularity in the colony, that he was left out of the board of assistants at the election of 1686. Soon after, however, he received his commission as president, and entered upon the duties of the office. A council was named to aid him in the government, but the house of representatives was dispensed with.

He organized the courts of the colony anew, and, among other improvements, introduced one regulating the admission of attorneys, and requiring an oath of office to be taken by them upon their admission to the bar. This oath was adopted in July, 1686, and was in most respects substantially like the one required by the law of 1701, which has been used ever since that time.

The term of his office soon expired by the arrival of sir Edmund Andros, in December, 1686, with a commission as governor of all New England, so that Dudley had only held the place of president a little over seven months. He was placed at the head of Andros's council by commission from the king, and seems to have been too much in his confidence,

to escape the odium with which that miserable tyrant was regarded by the people of Massachusetts.

No change was made in the courts until March, 1687, when a superior court was established, consisting of three judges, and Dudley was placed at the head of the court. He held this place for about a year, when he was superseded by the appointment of chief justice Palmer, and accepted a subordinate place on the bench. It was while he was at the head of the court, that the famous trial of the Rev. Mr. Wise, of Ipswich, was had. The town, believing that the governor had no right to levy money without a legislative grant, declined assessing a tax, which the governor had ordered. For this refusal on the part of the town, their clergymen and several of the principal men were arrested and carried to Boston, where they were shut up in jail to await their trial. An application for a writ of habeas corpus was refused them by the chief justice, which was made the ground of an action for damages against him by Mr. Wise, after the revolution.

After a tedious and harassing delay, the prisoners were put upon their trial. They claimed the privileges secured to them as Englishmen by the magna charta and the laws of England. The chief justice, however, informed them, that they must not expect that the laws of England would follow them to the ends of the earth, and concluded by telling them, that they had no more privileges left them than to be sold as slaves. He charged the jury, and stated that the court "expected a good verdict from them, seeing the matter had been so sufficiently proved against the criminals." A verdict was accordingly rendered against them, and a severe punishment thereupon inflicted, because the town in which they resided declined yielding to an arbitrary and illegal act.

This anecdote may serve to illustrate the state of the administration of justice at that time, in Massachusetts, as

well as the judicial character of judge Dudley. Nor was this a solitary case of the grossest prostitution of the forms of justice, to purposes of party vengeance and sordid self-interest, which was practised while he was upon the bench.

Dudley continued upon the bench until the revolution of 1689. At the time that broke out, he was holding a court in the Narraganset country. Upon hearing what had taken place in Boston, some of the people of Providence went and arrested him, and brought him back to his house in Roxbury, where he was placed under a guard of soldiers. From thence he was carried to Boston, and after being imprisoned awhile at the house of Mr. Eyre, one of the council of safety, he was confined in the castle and underwent a long and rigorous imprisonment. He complained of being destitute of necessary food and fire, and there is little doubt that he suffered under the severity to which he was subjected.

He was sent with Andros to England to answer to the complaints of the colony, but these were never prosecuted, and he seems not to have suffered much loss of royal favor, for, the following year, he was appointed chief justice of New York, and held that office about three years. He found that province in a state of great party excitement, and his conduct in the trial of Leister, the head of one of the factions, gave great offence to his political opponents, and was the ground of serious charges against him in England.

He does not appear to have been satisfied with the office he held; for, in 1693, he was again in England, endeavoring to supplant governor Phipps, but having failed in this attempt, he was made lieutenant governor of the isle of Wight, through the influence of lord Cutts, the governor of that island, and held the office eight years. While resident there, he was elected and served as a member of parliament for Newton in the county of Southampton, but with what degree of success, does not very satisfactorily appear. With

all his honors and emoluments, however, he was discontented while away from New England, and spared no opportunity for recovering the favor he had lost with the people there. He courted the dissenters, made peace with Mr. Mather, and succeeded so well in his endeavors to remove the prejudices existing against him, that, on the death of lord Bellamont, he obtained the office of governor of Massachusetts and New Hampshire. He returned to Boston with his commission, June, 1702, and was well received by the people. He however remembered those, through whose agency he had suffered at the time of the revolution, and spared no opportunity of manifesting his feelings of hostility towards them. Several of those who had been members of the council for many years were again elected, but were rejected by him on coming into office. Among these was Mr. Cooke, who was among the most popular men in the province, and connected with many of its most influential families. This involved him in disputes, and his lofty bearing as chief magistrate also gave offence to many. Charges of a scandalous nature were preferred against him to the queen, but did not find credence in England, nor were they generally believed even in Massachusetts.

Besides the wars with the Indians, the administration of governor Dudley was distinguished by two military expeditions, one in 1710, which resulted in the reduction of Port Royal, and the "Canada expedition" of 1711, which was little better than a series of disasters from the beginning to the end. Among the consequences which resulted from the latter expedition, was a heavy province debt, and a resort to bills of credit as a means of defraying the expenses thereby incurred. Out of these arose two parties which long divided the province; one contending for the establishment of a private bank, the other for a loan of the public faith, in the form of bills of credit. The latter project prevailed, and of the two it had the preference in the mind of

the governor, who thereby enlisted a bitter and powerful opposition to all his measures.

The governor's commission expiring upon the death of the queen, he was supplanted by colonel Burgess, who was commissioned on the 17th March, 1715. Burgess, however, never came to New England, and was succeeded by colonel Shute. Governor Dudley retired from the office in November, 1715, and the place was filled by the lieutenant governor till the arrival of governor Shute, in October, 1716. Governor Dudley was at this time nearly seventy years of age, and had begun to feel the cares of government as a heavy burden; and upon his leaving the chair of state, he retired to his seat in Roxbury, where he died April 2, 1720, at the age of 73 years. On the 8th of the month he was buried with great pomp and respect. Two regiments of infantry and two companies of cavalry took part in his funeral; minute guns were fired from the castle and all the bells in Boston were tolled. The council attended, and an immense concourse of the most influential men in the province was present on the occasion.

No native of New England had passed through so many scenes and enjoyed so many public honors and offices as governor Dudley.

Had he remained in private life, he would have been justly eminent as a philosopher and a scholar, a divine or a lawyer. He was, in fact, to no small extent, all these, even amidst the cares and perplexities of public life.

In private life, he was amiable, affable and polite, elegant in his manners, and courteous and gentlemanly in his intercourse with all classes. His person was large, and his countenance open, dignified and intelligent. He had been familiar with the court, and his address and conversation were uncommonly graceful and pleasing. As a judge he was distinguished for gravity, dignity, and on ordinary occasions, mildness of manner. As a chief magistrate, none

could doubt his capacity to govern, and the prudence with which he managed the affairs of the province, disarmed even the opposition of his enemies.

Ambition was his ruling passion, and the desire to be the governor of his own native province, seems to have outweighed every other consideration of profit or advancement. In accomplishing his ends, he regarded means as of a secondary consideration. While pursuing his career of ambition, he encountered enemies the most determined, and at the same time was able to win and draw around him ardent and devoted friends, who never deserted him. He ran through the scale of honors and political preferments in the colony, and retired at last wearied and worn out with the perplexities and responsibilities of office, to enjoy a few years of quiet and reflection in the scenes of domestic life. He was justly regarded as an honor to Massachusetts, and though his character and opinions as a judge probably added little weight to the judiciary of the province, it seemed due to his eminent station in public life, to trace thus briefly his political character, although these sketches are chiefly designed to preserve the names of those who have been distinguished by their connection with our courts.

Governor Dudley was connected by birth or marriage with many of the principal families in the province. His son Paul was afterwards the able and distinguished chief justice of the province, and another of his sons was for many years speaker of the house of representatives. His descendants are still among us, but the name has yielded to the republican tendency of our institutions, and is not now to be found among those in place and power in our commonwealth.

E. W.

## JURISPRUDENCE.

## I.—DIGEST OF ENGLISH CASES.

## COMMON LAW.

Selections from 5 Adolphus and Ellis, Parts 3 and 4; 6 Same, Part 1; 2 Neville and Perry, Part 2; 4 Bingham's New Cases, Parts 1 and 2; 3 Meeson and Welsby, Part 2; 6 Dowling's Practice Cases, Part 2; and 8 Carrington and Payne, Part 1.

ACTION ON THE CASE. (*For negligent driving—Pleading.*)

Case for the negligent management of a train of railway carriages, whereby it ran against another train, in one of which the plaintiff was riding, and injured him. Plea, that the parties having the management of the train in which the plaintiff was, managed it so negligently and improperly, that, in part by their negligence, as well as in part by the defendant's negligence, the defendant's train ran against the other, and caused the injuries to the plaintiff: Held, that the plea was bad in form, as amounting to not guilty; and in substance, for not showing, not only that the parties under whose management the plaintiff was were guilty of negligence, but also that by ordinary care they could have avoided the consequences of the defendant's negligence. (11 East, 60.) *Bridge v. Grand Junction Railway Company*, 3 M. & W. 244; *Armitage v. Same*, 6 D. P. C. 340.

ARBITRATION. (*Award—Certainty.*) To a breach of covenant for non-payment of an instalment due for certain work done, the defendants pleaded, first, that the work had not been completed; second, that the instalments had been paid when

due. The cause was referred to an arbitrator, who awarded that a verdict should be entered for the plaintiff on the first issue, damages 1s. ; on the second issue, damages, 13s. 4d. : Held, sufficiently certain, and that it was not necessary that one entire sum should be awarded on the entire breach. *Smith v. Festiniog Railway Company*, 4 Bing. N. C. 23 ; 6 D. P. C. 190.

2. (*Award—Finality.*) Four actions between distinct parties, together with all matters in difference between the parties, were referred to an arbitrator. Among the matters in difference was a fifth action, an ejectment relating to a part of the premises in dispute ; of which fifth action the award took no notice, although it had been mentioned to the arbitrator : Held, that this omission rendered the award bad in toto. (1 Turn. & Russ. 128 ; 7 East, 81 ; 1 B. & Ad. 723 ; 2 Saund. 293.) *Stone v. Phillips*, 4 Bing. N. C. 37 ; 6 D. P. C. 247.

3. An action of trover against a pawnbroker was referred to arbitration. The liability of the defendant to damages depended on the question, whether or not he had made sufficient inquiries when the goods were pledged. The arbitrator, in a case stated for the opinion of the court, having declared that he was unable to find whether or not the defendant made the requisite inquiries, the court referred it back to him to find that fact affirmatively or negatively. *Ferguson v. Norman*, 4 Bing. N. C. 52.

**ASSUMPSIT.** (*Consideration—Forbearance to sue.*) Forbearance to sue, on the part of the assignee of a bond, is a good consideration for a parol promise by the obligor to pay by instalments, and to give a warrant of attorney to enter up judgment for the whole in case of default in payment of any instalment. The mutuality of the contract consists in the forbearance by the assignee being a condition precedent to any right to sue on the promise.

The bond is in no respect varied by the parol agreement, since it was already forfeited at the time of making the new contract. (1 Saund. 210, n. 1 ; 2 Saund. 137, n. 2 ; 1 Lord Raym. 368 ; Com. Dig. Action on the Case sur Assumpsit, Consideration (B)). *Morton v. Burn*, 2 N. & P. 297.

**BILLS AND NOTES.** (*Notice of dishonor.*) The following was held a sufficient notice of dishonor to the drawer of a bill of exchange :—“ Your bill, drawn on T. and accepted by him, is this day returned with charges, to which we beg your immediate attention.” (2 M. & W. 799.) *Grugeon v. Smith*, 2 N. & P. 303.

2. (*Liability on, after giving renewed bill.*) The plaintiff held a bill of exchange accepted by the defendant. When it became due, the defendant asked for time, and some months afterwards gave the plaintiff another bill for the same amount, the plaintiff at the same time telling him that something was due for interest, and continuing to hold the first bill. The second bill was paid when due : Held, that the plaintiff was, nevertheless, entitled to sue the defendant, and also the drawer, on the first bill, for the interest due upon it. *Lumley v. Musgrave*, 4 Bing. N. C. 9 ; *Lumley v. Hudson*, ib. 15.
3. (*Notice of dishonor.*) The drawer of a bill being applied to for payment, said, “ If the acceptor does not pay, I must, but exhaust all your influence with the acceptor first.” The drawer afterwards directed the party applying to raise the money on the lives of himself and the acceptor : Held, that these admissions were not to be taken as conclusive evidence of the drawer’s having received or waived notice of dishonor of the bill. (7 East, 231 ; 3 Tyrw. 923.) *Hicks v. Duke of Beaufort*, 4 Bing. N. C. 229.
4. (*Same.*) Where a party drew a bill, dating it generally “ London,” on an acceptor also resident in London, whose address was stated in the bill : Held, that proof that a letter, containing notice of the dishonor of the bill, was put into the post-office, addressed to the drawer at “ London,” was evidence to go to the jury that he had due notice of dishonor. (Ry. & M. 249.) *Clarke v. Sharpe*, 3 M. & W. 166.)

**CARRIER.** (*Destruction of goods by accident.*) To a declaration on a contract by the master of a steam vessel to convey goods from Dublin to London, and to deliver them at the port of London to plaintiff or his assigns, a plea that, after the arri-

val of the vessel at London, the defendant caused the goods to be deposited on a wharf, there to remain until they could be delivered to the plaintiff, the wharf being a place where goods from Dublin were accustomed to be landed, and fit and proper for such purpose ; and that before a reasonable time for their delivery had elapsed they were destroyed by a fire, which broke out there by accident,—was held bad on demurrer. (5 T. R. 389.) *Gatlife v. Bourne*, 4 Bing. N. C. 314.

2. (*Common, who is.*) A town carman, whose carts ply for hire near the wharfs, and who lets them out by the hour, day, or job, is not a common carrier.

If goods be delivered to A., under a contract that the owner shall go with them and take care of them, that is not a delivery of them to A. as a common carrier. *Brind v. Dale*, 8 C. & P. 207.

**COINING.** (*Uttering, what.*) The giving of a piece of counterfeit coin in charity is not an uttering within the statute 2 Will. 4, c. 34, s. 7, although the party may know it to be counterfeit ; for there must be an intention to defraud some person shown. *Rex v. Page*, 8 C. & P. 122.

**CONDITION PRECEDENT.** Agreement, that lessee should spend 200*l.* in repairs, to be inspected and approved of by the lessor, and to be done in a substantial manner ; lessee to be allowed to retain the sum out of the first year's rent : Held, that the lessor's approval was not a condition precedent to the lessee's retaining the rent. (9 Bing. 672.) *Dalliman v. King*, 4 Bing. N. C. 105.

**COPYRIGHT.** (*In dramatic productions.*) What is a representation of part of a dramatic production, so as to subject the party representing it to a penalty under the 3 & 4 Will. 4, c. 15, s. 2, is a question for the jury. And a jury having found that the singing of two or three songs of the plaintiff's libretto to an opera was a representation of part of the plaintiff's production, the court refused a new trial. *Planché v. Braham*, 4 Bing. N. C. 17.

**CORPORATION.** Assumpsit is maintainable against a corpora-

tion aggregate without a head, on an executed contract. (1 Camp. 466; 4 Bing. 75: 2 C. & P. 365, 371; 1 Ventr. 47; 4 C. & P. 111; 3 B. & Ad. 125.) *Beverly v. Lincoln Gas Light and Coke Company*, 2 N. & P. 283.

**COVENANT.** Covenant lies for rent reserved by indenture, and accruing before a re-entry for a forfeiture, notwithstanding the lessor, under such re-entry, is to have the premises again, "as if the indenture had never been made." *Hartshorne v. Watson*, 4 Bing. N. C. 178.

**DEED.** (*Estoppel by release in.*) To assumpsit for the recovery of certain interest due to the plaintiff on the sale by him to the defendant of a policy of insurance on life, the defendant pleaded, that by indenture made between the plaintiff and defendant, the plaintiff released, exonerated, and discharged the defendant of and from all claim and demand whatsoever, for, upon, or in respect of the purchase of the policy, and all moneys due to the plaintiff in respect thereof, and of and from the supposed cause of action in the declaration mentioned. It appeared in evidence that the policy was sold subject to a condition that the purchaser should pay down a deposit of 20*l.* per cent., and sign an agreement for payment of the remainder on the 8th June, 1835; but should the completion of the purchase be delayed, the purchaser was to pay interest on the balance of the purchase money, at 5*l.* per cent. per annum, from that day until the purchase was completed. The defendant did not complete the purchase till January 1836, when he paid the purchase money in full, with interest from the 8th June, and an assignment of the policy, duly executed by the plaintiff, containing a release in the terms stated in the plea, and having a receipt for the whole purchase money indorsed, was handed to the defendant. It was afterwards discovered that the plaintiff's attorney, on that occasion, under calculated the interest by 34*l.*: Held, that the release was a bar to an action for that sum. *Harding v. Ambler*, 3 M. & W. 279.

**EASEMENT.** (*Right of support to house from adjoining sub-soil.*) If a party builds a house on his own land, which has previously been excavated to its extremity for mining purposes,

he does not acquire a right to support for the house from the adjoining land of another, at least until twenty years have elapsed since the house first stood on excavated land, and was in part supported by the adjoining land, so that a grant by the owner of the adjoining land of such right to support, may be inferred; for rights of this sort can have their origin only in grant.

And *semel*, such grant ought not to be inferred until after the lapse of twenty years, since the owner of the adjoining land knew or had the means of knowing that the land had been so excavated.

Therefore, the owner of the adjoining land is not liable to an action on the case, if, within such period, he works mines under his own land so near its boundary as to cause the excavated land on which the house stands to sink, and the house to be thereby injured. (3 B. & Ad. 871.) *Partridge v. Scott*, 3 M. & W. 220.

**EVIDENCE.** (*On issue of sanity.*) On a question as to the competency of a devisor to make a will, letters addressed to him, found after his death, open, with the seals broken, in a cupboard under his bookcase, in a private room, (along with other letters indorsed by the testator, and to some of which he had written answers), were held inadmissible in evidence, by Tindal, C. J., Parke, B., Bosanquet, J., and Coltman, J.: dissentientibus Park, J. and Gurney, B.

A letter found in the same place, addressed to the testator, requesting him to communicate with his attorney on a matter of business, and indorsed by the attorney, (who lived some miles off), was held admissible, by Tindal, C. J., Park, J., and Gurney, B.; Parke, B., Bosanquet, J., and Coltman, J. dissentientibus. *Wright v. Doe d. Tatham*, 2 N. & P. 305.

**2. (Of accomplice.)** The confirmation of an accomplice should be as to some circumstance affecting the party accused; as by showing him and the accomplice together, under such circumstances as were not likely to have occurred unless there was concert between them. *Rex v. Farler*, 8 C. & P. 106.

3. (*Deposition before magistrate.*) It was proved by the magistrate's clerk that the deposition of a prosecutor was taken before the magistrate, in the presence of the prisoner, who had a full opportunity of cross-examination. It was taken on the same sheet of paper as that of the other witnesses, and at the end of the last deposition were the words "sworn before me," and the magistrate's signature. The prosecutor had died before the trial: Held, that the deposition was receivable in evidence. *Rex v. Osborne*, 8 C. & P. 113.

**FIXTURES.** (*Not recoverable in trover.*) A lessee cannot, even during his term, maintain trover for fixtures attached to the freehold. (2 M. & W. 450.) *Mackintosh v. Trotter*, 3 M. & W. 184.

**FRAUDS, STATUTE OF.** (*Interest in land.*) Declaration in assumpsit stated, that the plaintiff was desirous of taking a furnished house as a school; that the defendant was possessed of a house in part furnished, and all other furniture necessary for the completely furnishing the same; and thereupon, in consideration that the plaintiff, at the defendant's request, would take possession of the said house, and would, if the furniture necessary for completely furnishing the house for the purposes aforesaid, should be sent into the house by the defendant in a reasonable time, become the defendant's tenant of the house, with all the furniture aforesaid, at the rent aforesaid, and pay the rent quarterly on, &c; the defendant promised that he would, within a reasonable time after the plaintiff should have so taken possession of the house and premises, send in all the furniture necessary for completing the furnishing of the house with furniture of good quality. Averment, that the plaintiff took possession of the house; but that the articles of furniture sent in by the defendant were not of good quality, and all the furniture necessary for the completion of the furnishing of the house was not sent in. Plea, that there was no note or memorandum in writing, of the promise stated in the declaration: Held, on demurrer, that the promise stated in the declaration related to an interest in land, and therefore no action could be maintained on it, for

want of a memorandum in writing. *Mechelen v. Wallace*, 2 N. & P. 224.

2. (*Acceptance—Pleading.*) Where a joint order is given for several classes of goods, the acceptance of one class is a part acceptance of the whole, within s. 17 of the Statute of Frauds. (1 B. & C. 156; 2 B. & C. 37.)

*Semblable*, that if the purchaser of goods has used (in the opinion of the jury) more of them than was necessary for experiments, that does not amount to an acceptance within the statute.

Agreed, that the defence that there was no sufficient contract to satisfy the Statute of Frauds, may be taken under the general issue. *Elliott v. Thomas*, 3 M. & W. 170.

ILLEGAL CONTRACT. (*Contract made on Sunday, how rendered valid—Pleading.*) To a count for goods sold and delivered, the defendant pleaded that they were goods sold and delivered to him by the plaintiff in the way of his trade, on a Sunday, contrary to the statute. The plaintiff replied, that the defendant, after the sale and delivery of the goods, kept them for his own use, without returning or offering to return them, and had thereby become liable to pay the sum mentioned in the plea, being so much as they were reasonably worth: Held bad on demurrer. (6 Bing. 653.) *Simpson v. Nicholls*, 3 M. & W. 240; 6 D. P. C. 355.

INNKEEPER. An innkeeper cannot detain the person of his guest, or take off his clothes, in order to secure payment of his bill. (Over-ruling the dictum of Eyres, J., 1 Show. 269.) *Sunbolf v. Alford*, 3 M. & W. 248.

INSURANCE. (*Compensation received from insurer cannot be deducted from damages by wrong-doer.*) The plaintiff sued the defendants for damaging his ship by collision: Held, that the defendants were not entitled to deduct from the amount of the damages, a sum of money paid to the plaintiff by insurers in respect of such damage. (3 Doug. 60; Park, Ins. 226.) *Yates v. Whyte*, 4 Bing. N. C. 272.

2. (*Consolidation rule.*) Where two actions were brought on two policies of insurance by the same plaintiffs against different

defendants, the court refused to make a consolidation rule on the terms of the plaintiffs and defendant in each being concluded by the verdict in one action, against the consent of the plaintiffs. (1 Ad. & E. 635; 4 Ad. & E. 646.) *M'Gregor v. Horsfall*, 6 D. P. C. 338.

**LARCENY.** A person, by false pretences, induced a tradesman to send by a servant to a particular house, goods to the value of 3s., with change for a crown-piece. On the way he met the servant, and induced him to part with the goods, giving him a crown-piece, which afterwards was found to be bad. The master and servant both swore that the latter had no authority to part with the goods or change without receiving the crown-piece in payment, though the former admitted that he intended to sell the goods and never expected them back again: Held, that the offence amounted to larceny. (1 Leach, 520.) *Rex v. Small*, 8 C. & P. 46.

2. (*Stealing in a dwelling-house.*) A man went to bed with a prostitute in a house to which she took him, having put his watch in his hat on a table: while he was asleep she stole his watch: Held, that the offence was that of stealing in a dwelling-house, and not of stealing from the person. (R. & R. 418.) *Rex v. Hamilton*, 8 C. & P. 49.

**LIBEL.** (*What.*) The publisher of a magazine, in observations on an exhibition of flowers, printed of the exhibitor the following matter:—"The name of G. is to be rendered famous in all sorts of dirty work: the tricks by which he, and a few like him, used to secure prizes, seem to have been broken in upon by some judges, more honest than usual. If he be the same man who wrote an impudent letter to the Metropolitan Society, he is too worthless to notice; if he be not the same man, it is a pity two such beggarly souls could not be crammed into the same carcass :" Held, a libel. *Green v. Chapman*, 4 Bing N. C. 92.

2. (*Privileged communication.*) A widow lately being about to marry the plaintiff, the defendant, her daughter's husband, wrote her a letter, containing imputations on the plaintiff's character,

and desiring a diligent and extensive inquiry into it: Held, that the plaintiff could not recover without proof of express malice. *Todd v. Hawkins*, 8 C. & P. 88.

**MANSLAUGHTER.** (*By reason of negligent manufacture of dangerous weapons.*) An ironfounder being employed to make some cannon, to be used on a day of rejoicing, after one of them had burst, and had been returned to him in consequence, sent it back in so imperfect a state, that on being fired it burst again, and killed a person: Held, that the maker was guilty of manslaughter. *Rex v. Carr*, 8 C. & P. 163.

**PARTNERSHIP.** (*Liability of dormant partner.*) A dormant partner is not liable on the written agreement of his copartners, to which he is not a party, to employ a person in their trade for a certain period. (15 East, 7; 2 Campb. 308.) *Beckham v. Knight*, 4 Bing. N. C. 243.

**PRINCIPAL AND ACCESSORY.** A was indicted for the wilful murder of B, and C was indicted for receiving, harboring and assisting A, well knowing that he had committed the felony and murder aforesaid: Held, that if the offence of A was reduced to manslaughter, C might nevertheless be convicted as accessory after the fact. *Rex v. Greenacre*, 6 C. & P. 35.

**PRINCIPAL AND SURETY.** (*Giving time to principal, when surety discharged by—Pleading.*) Assumpsit against the maker of a promissory note. Plea, that it was a joint and several note made by the defendant and T. S., and that the defendant entered into it at the request of T. S., and for his accommodation, and in order that he might get it discounted by the plaintiffs; that the defendant had no other value or consideration for making it, and that he made it as a mere surety for T. S., of which plaintiffs had notice; and that, although the note was due in the hands of the plaintiffs for six months, yet the defendant had no notice, till the commencement of this suit, of its nonpayment by T. S.; and that the plaintiffs gave time for payment to T. S., to the prejudice and without the knowledge or consent of the defendant: Held bad on general demurrer. *Clarke v. Wilson*, 3 M. & W. 208.

**RELEASE.** (*What amounts to.*) A covenant not to sue upon a simple contract debt for a limited time is not pleadable in bar of an action for such debt. (Cart. 63; 2 Salk. 573.) *Thimbleby v. Barron*, 3 M. & W. 210.

**SCHOOLMASTER.** (*Wearing apparel furnished by.*) A schoolmaster has no right to charge for wearing apparel furnished by him to a scholar without the sanction, express or implied, of the parent or guardian. *Clements v. Williams*, 8 C. & P. 58.

**SHIPPING.** (*Contribution for loss by jettison.*) The owner of goods laden on the deck of a ship, according to the custom of a particular trade, is entitled to contribution from the ship owner for a loss by jettison. (4 Camp. 142; Abbott on Sh. 363; Emerigon, c. 12, s. 42; Valin, tit. Du Capitaine, art. 12; Consol. del Mare, c. 183.) *Gould v. Oliver*, 4 Bing. N. C. 134.

**TENDER.** A tender was made in these words—"I have called to tender 8*l.* in settlement of R.'s bill :" Held, that as the meaning of the words was ambiguous, it was for the jury to consider whether the tender was conditional or not. *Eckstein v. Reynolds*, 2 N. & P. 256.

**WOUNDING.** A blow was given with a hammer on the face, which broke the lower jaw in two places; the skin was broken internally, but not externally, and there was not much blood: Held, a wounding within the statute 1 Vict. c. 85. *Reg v. Smith*, 8 C. & P. 173.

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#### EQUITY.

Selections from 2 Keen, Part 1; 8 Simons, Part 1; and 2 Younge and Collyer, Part 3.

**AMENDMENT.** (*Bill of discovery—Insurance cause.*) Amendment not allowed to be introduced after answer, in a bill for discovery in aid of a defence at law, where the new matter might with proper diligence have been discovered and introduced into the original bill.

But where the original bill inquires into the particulars of a contract, and another distinct subsequent contract is disclosed by the answer, that may be inquired into by amended bill. *Mills v. Campbell*, 2 Y. & C. 398.

**CHARGE.** (*Of legacies by unattested codicil—Annuity.*) A testator, by will duly attested, directed his real and personal estate to be sold, and the money to arise therefrom to be applied in payment of his debts, &c. and also the legacies which he might bequeath by any codicil to his will. He afterwards, by an unattested codicil, gave an annuity to his wife: Held, that such annuity could not be distinguished from a mere pecuniary legacy, and was charged on the real estate. *Swift v. Nash*, 2 Keen, 20.

**EVIDENCE.** (*Contradiction.*) An affidavit by a party contradicting declarations made by him in a deed, is admissible in evidence. *Timson v. Ramsbottom*, 2 Keen, 52.

**2.** (*Pedigree—Entry in religious book.*) An entry in these words, "E. J. her book, 15th June, 1680, the gift of H. J. her father," was found in a book of a religious character, no date being given as to the date of such entry, or as to its having been made by E. J., but it was shown that the book had been preserved in the family, and that it had been delivered to a descendant of the family as a family memorial by his grandfather, who, at the same time, in the year 1798, made other entries in it as to the family pedigree: Held, that the first-mentioned entry was admissible in evidence. *Hood v. Beauchamp*, 8 Sim. 26.

**EXECUTOR.** (*Retainer by.*) One of two executors has a right to retain, out of a balance due from both to the testator's estate in respect of assets received, a debt due to himself. *Kent v. Pickering*, 2 Keen, 1.

**GAMING.** (*Money lent at play—I. O. U.*) It is still a mooted point at law, whether money lent at play is recoverable in an action; and an action having been brought upon an I. O. U. for the recovery of money alleged to have been so lent, the plaintiff at law must, on a bill of discovery being filed against him, answer as to that point. *Wilkinson v. L'Eaugier*, 2 Y. & C. 367.

2. (*Same point—Foreign law.*) The plaintiff at law in last case having answered as to the circumstances of the loan, which appeared to have been made in a gaming house at Paris, the injunction to restrain his proceeding at law was dissolved ; a sufficiently distinct case as to the circumstances of the loan, and as to the effect of the French law on the point, not having been raised by bill and answer for the question to be decided in equity. *S. C.*

LACHES. (*Bill of discovery.*) The laches of the plaintiffs in a bill of discovery, in aid of a defence at law, is not a ground for depriving them of a commission for the examination of witnesses abroad, though it is a ground for putting them to more severe terms. *Mills v. Campbell*, 2 Y. & C. 402.

LEGACY. (*To class of children.*) Where a fund was given to one for life, remainder to such children of another person as should attain the age of twenty-one. The legatee for life died before the eldest child attained that age : Held, without argument, that all the children in esse when such eldest child did attain twenty-one, were entitled to share on attaining that age themselves. *Clarke v. Clarke*, 8 Sim. 59.

2. (*Lapse prevented by maintenance.*) A legacy was given charged on real estate, and payable when the brother and sister of the legatee had attained twenty-one, and the rents of the estate were up to that time given for their maintenance : Held, that the legacy did not lapse by the death of the legatee before the time of payment. *Goulbourn v. Brooks*, 2 Y. & C. 539.

3. (*Specific misdescription.*) Testator bequeathed 2042*l.* In the 5*l.* per cent. bank long annuities for thirty years, which he had purchased. He had bought 106*l.* long annuities for the said sum of 2042*l.*, which had thirty years to run : Held, that the 106*l.* annuities passed as a specific legacy. *Attorney-General v. George*, 8 Sim. 138.

LEGATEE. (*Description of, uncertainty.*) A bequest of residue to the "Inhabitants of Tawleaven Row," who, it appeared by the report of the Master, consisted, at the time of the death of the testatrix, of seven poor families, making up thirty in number, established. *Rogers v. Thomas*, 2 Keen, 8.

**MARRIAGE ARTICLES.** (*Mutual covenants, construction and effect of.*) When the father of intended husband and wife mutually covenanted to settle certain property in consideration of intended marriage, and of performance of covenant of the other party, but in the recitals the intended covenants were each of them spoken of without reference to the other, and the covenants for the title were also in form independent: Held, on a suit by one of the children of the marriage, that the covenants were not dependent on each other, but it was said by the court, that covenants in marriage-articles might be made dependent on each other, if the intention were clearly expressed. *Loyd v. Loyd*, 8 Sim. 7.

**MISTAKE.** (*Specific performance—Sale by auction.*) Where the same auctioneer was employed by two parties to sell at the same place, and on the same day, estates belonging to each, and a friend of one of the parties, who had undertaken to bid for him, went to the sale, and bid by mistake for a portion of the estate of the other party (the plaintiff), which was knocked down to him at a high price, upon which he handed up his card to the auctioneer, but subsequently, on discovering his error, refused to sign the contract: Held, on a suit for specific performance by the plaintiff, that he should be left to his remedy at law. *Malins v. Freeman*, 2 Keen, 25.

*Quære*, whether a signature by the clerk of the auctioneer is a sufficient signature within the statute? S. C.

**MORTGAGE.** (*Mortgage on two estates—Foreclosure against one.*) Where a man has a mortgage on two estates, of which the equity of redemption has been subsequently conveyed or mortgaged to different parties, he cannot file a bill for foreclosure against the one estate, without making the purchaser of the other a party, as both estates must bear their share of the debt; nor does it make any difference that there is a statement in the bill, not admitted by the answer of the second mortgagees, that the purchaser of the other estate is a purchaser without notice, or under circumstances which would entitle him to hold the estate discharged from the mortgage. *Payne v. Compton*, 2 Y. & C. 457.

**PARTNERSHIP.** (*Quasi partnership in respect of joint loan—Parties.*) Every joint loan, whether contracted for mercantile purposes or not, is in equity joint and several. Therefore, where four persons opened a joint account with a bank, from which they borrowed money on such joint account: Held, that the bankers might claim payment of the whole debt out of the assets of one of such persons, being dead, but that the other three were necessary parties to the suit, as being interested in taking the account. (Exp. Kendall, 17 Ves. 525.) *Thorpe v. Jackson*, 2 Y. & C. 553.

**PATENT.** (*Partnership in—Joint liability of co-patentees.*) Joint owners of a patent are considered as partners; and where a party had been induced by the fraud of one of such joint owners to purchase from him, by an agreement, to which all were parties, the use of a patent right, which turned out to be of no value: Held, that each of the parties to the contract, one of whom had no interest in the patent at the time of the contract, was liable to refund the whole of the purchase-money fraudulently obtained. *Lovell v. Hicks*, 2 Y. & C. 481—on rehearing, see *S. C.* 2 Y. & C. 58.

**PLEADING.** (*Demurrer—Bill of discovery.*) To a bill of discovery in aid of a defence at law, which prayed for a commission to examine witnesses, a demurrer to the *relief only* was held bad. *Mills v. Campbell*, 2 Y. & C. 389.

2. (*Multifariousness—Insurance cause.*) A joint bill of discovery, brought by the underwriters at Lloyd's, and the *corporation* of the London assurance, against a party who had brought actions at law against each of them on the policies underwritten by each, is not multifarious, although the policies of the latter, as being a corporation, are under seal; because, since the passing of the 3 & 4 W. 4, c. 42, as to pleading specially in actions of assumpsit, the actions brought on each policy, though different in form, would be met by the same sort of plea. *Mills v. Campbell*, 2 Y. & C. 391.

**PORTION.** (*Interest—Maintenance.*) Where a testator made a special provision for the maintenance of his younger children

until receipt of their portions, and stated that the maintenance given to the sons, which was less than the interest on their portions, should be in lieu of interest, but said nothing as to the maintenance of his daughters, which was more than the interest on their portions being so taken: Held, that they were not entitled to interest as well as maintenance, although the will directed that the trustees should stand possessed of the fund appointed for payment of their portions, and of the interest, dividends, and annual produce thereof, in trust for his daughters, to be divided between them on their attaining twenty one. *Selby v. Gillum*, Y. & C. 379.

2. (*Lapse—Survivorship*. Where upon certain events which happened, 2000*l.*, part of a larger sum, to be raised for portions, out of real estates, was to be divided equally among A., B. and C., on their severally attaining twenty-one: Held, that the share in the 2000*l.* of one who died under twenty-one, fell into the estate. *S. C.*

**POWER.** (*Construction of—Separate use.*) Lands of the wife were, by settlement made on her marriage, limited to her for life, for her separate use, or to the use of such persons as she should appoint, with remainder, in default of appointment, to herself for life, with remainder to her husband for life, with remainder to her daughters in fee: Held, that the power extended only to the appointment of a life estate. *Lewthwaite v. Clarkson*, 2 Y. & C. 372.

2. (*Execution of.*) A power, to be executed by writing under the hand and *seal* of the donee, attested by *two* witnesses, or by will, signed, &c. in the presence of *three* witnesses: Held not to be executed by will, signed and sealed in the presence of *two* witnesses, the testator having himself drawn the distinction between testamentary and other writings. *Bambridge v. Smith*, 8 Sim. 86.

**PRINCIPAL AND AGENT.** (*Payment to agent—Set-off.*) A debtor who pays the amount of his debt to the agent of his creditor must pay it in cash, unless he can show that the agent had authority to receive payment in any other way.

If a man being indebted to his own agent authorize the agent to receive money due to him from his creditors, intending that the agent should thereout pay himself his own debt, he thereby gives the agent an implied authority to receive payment to the extent of such debt, in any manner he may think fit, consequently the amount of the agent's own debt may be written off in an account between him and the debtor. (*Barker v. Greenwood*, 2 Y. & C. 419.)

**SALE UNDER DECREE.** (*Costs.*) Where a sale has been directed under a decree, and the Master reports against the title, the purchaser is entitled to be paid out of the fund in the cause his costs of and subsequent upon his becoming a purchaser, and of investigating the title. *Attorney General v. The Corporation of Newark*, 8 Sim. 71.

2. (*Costs, where no fund in Court.*) Where an estate had been sold under a decree, but there was no reference to the Master as to the title, and no available fund in Court: Held, that the purchaser was entitled to be repaid by the plaintiff the costs of investigating the title and of the order for confirming the purchase. *Berry v. Johnson*, 2 Y. & C. 564.

**SOLICITOR AND CLIENT.** (*Purchase by solicitor from client.*) Where a solicitor agreed to purchase from a client, who had good title to an estate, that estate, when recovered, for 100*l.* and agreed to recover it at his own expense, and subsequently, after recovery of the estate, agreed to resell it to his client for 500*l.*, which was paid or allowed for, but the agreement was afterwards abandoned, and another agreement entered into for sale of the estate to a brother of the attorney for 600*l.*, and it was proved that the estate was worth considerably more, and that great pressure had been used against the client, and much fraud was charged by him in his bill: Held, at the suit of the client, that all the agreements were fraudulent and void, and an account decreed of what had been paid in respect of them, as well as of other mutual payments and liabilities. *Jones v. Thomas*, 2 Y. & C. 498.

**SPECIFIC PERFORMANCE.** See **MISTAKE.**

**SURETY.** (*Right of surety to assignment of securities against principal.*) Where the payee of a joint and several promissory note, which had been given by two parties, the one as a surety for the other, brought actions against both, and recovered judgments in each action, but took out execution against the surety only. Held, that the latter was not entitled to an assignment of the judgment against the principal, as that judgment was only available at law for the costs of the action against the principal. (*Hodgson v. Shaw*, 3 M. & K. 183.) *Dowbiggen v. Bourne*, 2 Y. & C. 462.

**TRUSTEES.** (*Appointment of new trustees.*) Estates were vested by a settlement in two trustees, each of whom was empowered to nominate any other person to succeed him in the trust after his decease : one trustee disclaimed ; the other trustee appointed by his will *three* persons to succeed him : Held, that they were duly appointed. *Sands v. Nugee*, 8 Sim. 130.

**WILL.** (*Construction—Absolute interest—Separate use.*) A testator having by will bequeathed a portion of his estate to his son, afterwards by codicil revoked that bequest, and directed his trustees to apply a certain fund to the support and maintenance of his son's wife, and for the support and education of his children born in wedlock. The son had no children living at the testator's death : Held, that the wife took the fund absolutely for her separate use. *Cape v. Cape*, 2 Y. & C. 543.

2. (*Construction, dividends and interest of stock.*) A gift of the dividends and interest of stock generally carries the capital, but where such a gift among several persons was followed by a gift of the capital, which was void for remoteness : Held, that it was a gift for the life of the legatees. N. B. The gift over was upon the death, not of the legatees, but of their children. *Cooke v. Bowler*, 2 Keen, 34.

3. (*Construction—Families.*) A testator gave the residue of his estate to be equally divided among his two daughters, their husbands and families : Held, that the daughter took absolutely. (*Robinson v. Tichell*, 8 Ves. 142; *Doe v. Joinville*, 3 East, 172.) *Robinson v. Waddelow*, 8 Sim. 134.

4. (*Construction—Stock.*) A bequest of what might remain of testatrix's money *after her lawful debts and legacies were paid*, sufficient to pass stock. *Rogers v. Thomas*, 2 Keen, 8.
5. (*Same point.*) A testator, whose personal property consisted chiefly of stock, after bequeathing various legacies, and giving certain directions as to her funeral, gave "whatever remains of money" to the children of E. B. : Held, that her general residuary estate including stock passed. *Dowson v. Gaskoin*, 2 Keen, 14.
6. (*Construction—Trust.*) A bequest of a fund to trustees, in trust to pay the dividends to A., the wife of B., for the benefit of B., herself and children, during B.'s life, and at B.'s death the fund to remain in trust for the benefit of A. and children for her life, and at her death to be equally divided among the children : Held, that A. was a trustee of the interest for herself, her husband, and children in equal shares during her life. *Taylor v. Bacon*, 8 Sim. 100.
7. (*Revocation—Erasure.*) A testator directed his executors to pay an annuity to his sister *A. B. the wife of C.*, for her separate use, or to such persons as the said A. B. should appoint, the receipt of the said A. B. to be a sufficient discharge, and he gave the residue of his estate among his brother E. and his sisters F. G. and A. B., *the wife of the said C.* He subsequently drew his pen through the name of his sister A. B. in the first, third, and fourth places, where it is mentioned, leaving her description as the wife of C. still remaining, except in the third place, where there was no description : Held, that the bequests to her were not revoked. *Martins v. Gardiner*, 8 Sim. 73.

## II.—DIGEST OF AMERICAN CASES.

**Selections from 7 Gill & Johnson (Maryland); 7 New Hampshire, and 17 Wendell (New York.)**

**ARBITRATION AND AWARD.** (*Conclusive in matters of law.*) The decision of the arbitrators is conclusive, as well in respect to questions of law as questions of fact. 17 Wendell, 410.

**ASSIGNMENT, &c.** (*Remedy of Assignee.*) The assignee of a chose in action must pursue his remedies in the same tribunals, in which the assignor, had no assignment been made, was bound to seek them. When obstacles growing out of the assignment are so interposed, as to hinder, or render extremely difficult, the successful prosecution of his remedies at law, then will a court of equity extend to him, that equitable protection which his exigences demand. *Adair v. Winchester*, 7 G. & R. 114.

**ASSUMPSIT.** (*Breach how stated.*) In assumpsit, the consideration of the promise must be stated truly; and if more or less than is proved is stated, the variance is fatal;—but in stating the promise, it is sufficient to state those parts only for the breach of which the action is brought, provided the parts omitted do not vary or qualify the parts stated. *Favor v. Philbrick*, 7 N. H. 326.

2. (*Evidence inadmissible.*) In an action brought for the breach of a promise by the defendant, to carry an account of the plaintiff against a third person to an attorney to be put in suit, the defendant is not entitled to try with the plaintiff the question whether any thing was in fact due upon the account. *Ib.*

**ATTACHMENT.** (*Liability of sheriff.*) A creditor delivered his writ to a sheriff, with directions to attach certain real estate of his debtor which was under mortgage. The sheriff, by his negligence, suffered other creditors to obtain prior attachments of the right to redeem. It was held, that the sheriff was liable for such neglect, although the other creditors never levied their

executions upon the right to redeem—it appearing that the right continued, subject to their attachments, until it was foreclosed. *Kittredge v. Bellows*, 7 N. H. 399.

**BAILMENT.** (*Driver of stage coach.*) The driver of a stage coach, in the general employ of the proprietors of the coach, and in the habit of transporting packages of money for a small compensation, which was uniform, whatever might be the amount of the package, is a bailee for hire, answerable for ordinary negligence, and not subject to the responsibilities of a common carrier—there being no evidence to show him a common carrier, farther than the fact that he took such packages of money as were offered. *Shelden v. Robinson*, 7 N. H. 157.

2. (*Burden of proof.*) Having received money to transport, the burden of proof is on him to excuse a nondelivery; and evidence to show that third persons have admitted that another package of money was stolen from the stage on the same day when he received the money in question, is not competent evidence to be submitted to a jury to prove a loss. *Ib.*
3. (*Liability of master of bailee.*) Where the servant of a bailee to keep for hire takes and uses the goods bailed in the business in which he is employed by the bailee, his master is liable for any loss or damage resulting to the goods from the carelessness of the servant while so used, although no express assent of the master is shown. *Sinclair v. Pearson*, 7 N. H. 219.
4. (*Liability of common carrier.*) A common carrier remains liable until the actual delivery of the goods to the consignee; or if the course of the business be such that delivery is not made to the consignee, his liability continues until notice of the arrival be given. *Gibson v. Culver*, 17 Wendell, 305.
5. (*Custom.*) It is competent, however, to a carrier, to prove that the uniform usage and course of the business in which he is engaged, is to leave goods at his usual stopping places in the towns to which the goods are directed, without notice to the consignees; and if such usage be shown of so long continuance, uniformity and notoriety, as to justify a jury to find that it was known to the plaintiff, the carrier will be discharged. *Ib.*

**BANKS.** (*Directors of.*) Where the charter of a bank requires seven directors to make a quorum, and the president is declared to be entitled to all the powers and privileges of a director, a meeting of the president and six directors constitute a sufficient board for the transaction of business. *Bank of Maryland v. Ruff*, 7 G. & J. 448.

**BILLS OF EXCHANGE, &c.** (*Note given by endorser.*) A promissory note in the usual form, given by an endorser to an acceptor of a bill, for the amount of the bill after its payment by the acceptor, is without consideration and void; yet if such endorsement was made by the endorser, for the purpose of saving the acceptor harmless from his acceptance, then the note, if given in pursuance of that understanding, would be valid. *Sowerwein v. Jones*, 7 G. & J. 335.

2. (*Demand on maker.*) It is no excuse for not making a demand of payment of a note, that the maker of the note is absent on a voyage at sea, the maker having a domicil within the state. Where no demand was made of the maker, in such case the endorser was holden not liable. *Dennie v. Walker*, 7 N. H. 199.
3. (*Endorsement of note paid.*) Where a note has been once paid, it ceases to be negotiable except as against those by whom a new endorsement has been made, and such parties as are not prejudiced by the transfer. *Cochran v. Wheeler*, 7 N. H. 202.
4. (*Subsequent promise of endorser.*) Where there has been no demand of payment of the maker of a note, or notice given of non-payment, the endorser is not holden on a subsequent promise in writing to pay the same, unless it be clearly shown that the promise was made with a full knowledge that there had been no demand and notice. *Farrington v. Brown*, 7 N. H. 271.
5. (*Failure of consideration.*) Where several individuals sighted a subscription paper, binding themselves to pay the sums affixed against their names, to a religious society, for the support of a minister of particular religious sentiments, who should be approved by a majority of the church connected with said society, after he had been employed four sabbaths, and on condition that

the society should raise and expend annually in the same manner an amount equal to the proceeds of said sums subscribed, providing that in case said money was misapplied the amount subscribed was to be forfeited ; and where notes were subsequently given by the subscribers, it was holden that the employment and payment out of said funds of a person of different religious sentiments from those specified, and of whom the society subsequently refused to approve, operated as a forfeiture of the sums raised on said conditions, and that payment of the notes could not subsequently be enforced. *Congregational Society v. Goddard*, 7 N. H. 430.

6. (*Signed by agents.*) Where individuals subscribe their proper names to a promissory note, *prima facie*, they are personally liable, although they add a description of the character in which the note is given ; but such presumption of liability may be rebutted by proof that the note was in fact given by the makers as the agents of a corporation for a debt of the latter due to the payee, and that they were duly authorized to make such note ; and such facts may be pleaded in bar of an action against the makers personally, averring knowledge on the part of the payee. *Brockway v. Allen*, 17 Wendell, 40.
7. (*Same.*) It is no objection to such defence that the name of the corporation be not correctly stated in the description attached to the signature ; it is enough if it appear that the makers did not intend to be personally bound. *Ib.*
8. (*Same.*) A person cannot shield himself from liability by showing that he acted as the agent of another, unless he avowed himself as such to him with whom he contracted, or the fact was known to him. *Ib.*
9. (*Consideration.*) It is no defence at law to an action on a promissory note, that it was given as part consideration of land sold by the payee, which he covenanted was free from incumbrances, and that the land is subject to a mortgage, executed by him, for a sum exceeding the amount of the note. *Lattin v. Vail*, 17 Wendell, 188.
10. (*Evidence.*) Where a promissory note is given for a specific

sum, evidence that at the time of the giving of the note, it was agreed between the parties that an account which the maker held against the payee should be deducted from the note, is not admissible. *Eaves v. Henderson*, 17 Wendell, 190.

11. (*Same.*) An agreement, however, made after the giving of the note, that a debt contemplated to be contracted by the payee with a third person, should be allowed in payment of the note, is a valid agreement, and the debt, when contracted, may be shown in payment of the note under the general issue. *Ib.*
12. (*Same—set-off.*) But such debt cannot be allowed as a set-off; and where a court of common pleas instructed a jury that they might allow it, either in payment or as a set-off, the judgment entered upon a verdict in pursuance of such charge was reversed. *Ib.*
13. (*Pleading.*) Where a note was made by A, payable to B or bearer, and C endorsed it, and an action was brought by a third person claiming by transfer from B, charging C as the maker of the note, it was held, on demurrer, that the declaration was bad. *Dean v. Hall*, 17 Wendell, 214.
14. (*Presentment—Agent.*) Although as between the payee and the drawer of a bill of exchange, the remedy of the former against the latter is not affected by the omission to make presentment for acceptance of a bill payable a given number of days after date, provided it be made at the maturity of the bill: the same rule does not prevail as between the payee and a broker or agent with whom the bill is left for collection. The agent is bound to present the bill for acceptance forthwith, and if not accepted, to give notice thereof to his principal, and if he neglect to do so, he becomes responsible in damages. *Allen v. Suydam*, 17 Wendell, 368.
15. (*Same.*) Where an agent had neglected to make presentment for 17 days, it was held that he was liable in damages to the full amount of the bill, although it appeared that the drawees had no funds, that they were directed by the drawer not to accept, and that the lateness of the presentment had no influence upon the non-acceptance: it appearing in proof that subsequent to the

drawing of the bill in question, other bills of the same drawer had been accepted by the same drawees and paid or secured to be paid. *Ib.*

16. (*Taking of security by endorser. Notice.*) The mere taking of security by an endorser from the maker of the note does not dispense with a demand and notice, unless it appear that funds have actually come into the hands of the endorser to an amount sufficient to satisfy the note, or that all the property of the maker has been actually transferred to the endorser. *Ib.*

BOND. (*How affected by legislative acts.*) The Exeter Bank was incorporated by an act of the legislature, in the year 1803, to continue for the term of twenty years from January 1, 1804. In 1822 an additional act of the legislature was passed, that provided that the first act should remain and continue in force, for a further term of twenty years from January 1, 1824; that there should be no division of the capital stock without the consent of the legislature, and that the bank should not have in circulation at any time bills exceeding in amount the capital stock actually paid; any cashier or other officer violating these provisions to forfeit not less than \$1000 nor more than \$10,000 R. was appointed cashier of the bank in 1809, gave bond with sureties for the faithful discharge of the duties of the office, and continued cashier until 1830. It was held that the bond covered all the time which R. remained in office, and that the sureties were not discharged by any of the provisions in the additional act of the legislature. *Exeter Bank v. Rogers*, 7 N. H. 21.

2. (*Name of obligor.*) It is not necessary that the name of the obligor appear in the bond. If it is signed and sealed by him, it binds him. *Pequawket Bridge v. Mathes*, 7 N. H. 230.

CANALS. (*Damages for private property—navigable streams.*) If in the improvement of the navigation of a public river, the waters of a tributary stream are so much raised as to destroy a valuable mill site situate thereon, and the stream be generally navigable, although not so at the particular locality of the mill site, the owner is not entitled to damages within the provisions of the canal laws directing compensation to be made for private

property taken for public use. *Canal Appraisers v. Tibbits*, 17 Wendell, 571.

2. (*Grants of rivers and streams.*) According to the common law, grants embracing within their bounds rivers and streams above tide water, convey not only the banks but the beds of the rivers or streams, and the islands therein, unless the latter are expressly reserved, or the terms of the grants be such as show a clear intention to exclude them from the operation of the rule of law. The right of the grantee, however, to the rivers or streams above tide water, if they be navigable, is not absolute, but subject to the right of the public to use the waters as a highway for the passage of boats, &c. *Ib.*

CASE. (*Against a stranger.*) Case, in the nature of waste, lies against a stranger, though waste will not. *Chase v. Hazelton*, 7 N. H. 171.

2. (*For damages by statute.*) In an action to recover damages given by statute for a violation of its provisions, it is not necessary to recite the statute; it is enough for a party seeking to avail himself of it to state facts, bringing his case within its provisions, and generally to refer to it. All the circumstances, however, essential to the support of the action must be alleged, or in substance appear on the face of the declaration. *Bayard v. Smith*, 7 Wendell, 88.

3. (*Fraudulent representation of grantor.*) Case lies against a grantor for a fraudulent representation that lands sold by him are free and clear of incumbrances, although in the deed conveying the lands there is a covenant against incumbrances. *Ward v. Wiman*, 17 Wendell, 193.

4. (*Malicious prosecution.*) In an action for malicious prosecution for procuring the indictment of the plaintiff for obtaining goods by false pretences, evidence that the plaintiff had been guilty of conduct, which to men unskilled in the technical rules of law, would excite a well grounded suspicion that a crime had been committed, is sufficient to warrant a verdict for the defendant on the ground of the existence of probable cause for criminal prosecution. *Baldwin v. Weed*, 17 Wendell, 224.

5. (*Against owner of mischievous dog.*) A man may keep a dog for the necessary defence of his house, his garden or his fields, and may cautiously use him for that purpose in the night time; but if he permit a mischievous dog to be at large on his premises, and a person is bitten by him in the day time, the owner is liable in damages, though the person injured be at the time trespassing on the grounds of the owner, by hunting in his woods without license. *Loomis v. Terry*, 17 Wendell, 496.
6. (*Against sheriff.*) Where a sheriff so negligently conducts himself in respect to personal property levied upon by him that it is lost, and the execution is satisfied out of the real estate of the defendant, whereby the lien of subsequent mortgage creditors upon the real estate of the defendant in the execution is reduced to the amount of the personal property lost, yet no action lies by such mortgage creditors against the sheriff for such malfeasance, unless the conduct of the sheriff be explicitly charged to have been fraudulent and with the intent to diminish the security of the mortgage creditors. *Bank of Rome v. Mott*, 17 Wendell, 554.

**CONDITION.** (*Precedent or subsequent.*) Whether a condition annexed to a devise is a condition precedent or subsequent, is a question that does not depend upon the order in which the words creating the condition stand in the will: but upon the order of time in which it is required to be performed, according to the intention of the testator, to be collected from the whole of the will, respect being had in looking for that intention to the subject matter of the devise, and the nature and object of the condition. *Creswell v. Lawson*, 7 G. & J. 227.

**CONSTRUCTION.** (*Of Statute.*) When the enacting words of a statute are ambiguous, the preamble or title may be resorted to as furnishing a key to their construction. *Kent v. Somervell*, 7 G. & J. 265.

**CONTRACT.** (*Of two under the seal of one.*) In action of *assumpsit* by S. against C. under the general issue, the plaintiff offered in evidence a written contract, which concluded as follows:—"In witness whereof we have hereunto set our hands

and seals, this, &c." The agreement was in fact signed and sealed by S. ; but there was no seal opposite the signature of C. which was established by proof of the hand writing of the subscribing witness, who was dead. The county court refused to permit the contract to be read to the jury, upon the ground that it was the deed of both S. and C. Upon appeal, held, that upon the proof it was the deed of S. but not of C. and might be read to the jury. *Stabler v. Cowman*, 7 Gill & J. 284.

2. (*Whether specialty or parol.*) Whether a written contract is a specialty or parol contract of a party to it, depends upon the fact whether it is sealed or not by such party, or some person for him and with his authority. The same contract may be the specialty of one, and the parol agreement of another party to it. *Ib.*
3. (*Where there is but one seal.*) Where there is but one seal to a contract, it is presumed to be the seal of the party whose signature is prefixed to it; but upon proof of its being made by the authority of the other parties to the contract, it will be held to be their seals respectively. *Ib.*
4. (*Of town for purchase of land.*) Before the 10th March, 1830, the town of A. purchased of J. J. a farm, a deed of which was executed and delivered by J. J. to the committee authorized by the town to make the purchase, and notes were given by the committee for the purchase money, with the understanding that the town might rescind the contract by a certain time and on certain conditions, which they did ; but the deed, by accident, still remained with the committee. At a meeting of the town on the 10th of March, 1830, said J. J. made proposals to the town to accept the farm,—which they accordingly did by a vote to that effect ; but at an adjournment of the same meeting, on the 24th of April, 1830, they voted to reconsider the vote of the 10th of March, and on the 8th of April, 1831, they also voted not to accept the farm. Held, that the vote of the town on the 10th of March, 1830, vested the title of the land in the town, and they were liable for the purchase money, according to the contract, notwithstanding their votes of the 24th of April, 1830, and 8th April, 1831, *Jewett v. Alton*, 7 N. H. 253.

5. (*Illegal, when not void.*) A contract by a mail-carrier, made under a misapprehension of the parties as to the true meaning of the statute regulating the post-office establishment, and without any intended fraud upon the post-office, to carry and deliver a letter in a manner prohibited by the statute, is not void, if the letter could have been delivered in any way by the mail-carrier so as to have answered all the purposes which he who sent it had in view, without any violation of the statute. *Favor v. Philbrick*, 7 N. H. 326.
6. (*Agreement necessary to.*) Where A. held a claim against an estate, and the executor caused a farm belonging to the estate to be sold, and left a portion of the purchase money in the hands of B., the purchaser, to pay A. and other creditors certain debts which B. agreed to pay, it was held that A. could not sue B., A. having never assented to this arrangement prior to his suit, or agreed in any manner to accept B. as his debtor, and extinguish his claim against the executor. *Butterfield v. Hartshorn*, 7 N. H. 345.
7. (*Extinguishment.*) H. sold A. a waggon. Afterwards A. sold the waggon to C., who agreed to pay H. the price which A. had agreed to pay H. for the wagon; and H. agreed to take C. as his debtor for that price. It was held, that the debt due to H. from A. was extinguished. *Heaton v. Angier*, 7 N. H. 379.
8. (*For turnpike shares.*) S., on the 6th March, made a written proposal to H. to convey to the latter all his right and title in certain shares in a turnpike, at \$5 per share, provided H. gave security for the price by the 24th March. After this, S. received a dividend upon the shares, and H., not being apprized that the dividend had been received, on the 18th March gave security for the price, and took a conveyance of all the interest S. then had in the shares. It was held, that the dividend received by S. belonged to H., and might be recovered in an action for money had and received. *Harris v. Stevens*, 7 N. H. 454.
9. (*Consideration.*) Where A. promised B. if he would procure an assignment of certain bonds held against him by individuals in Connecticut, for the payment of claims due from him therein

specified, he would pay B. the amount of said claims, it was holden that a subsequent procurement by B. of an assignment of said bonds was such a compliance with the proposition of A. as to constitute a binding contract betwixt said parties, and that there was a sufficient consideration and mutuality betwixt the parties, notwithstanding there was no original promise on the part of A. to comply with said proposition. *Morse v. Bellows*, 7 N. H. 549.

10. (*Same.*) In such case, an assignment of a bond is a valid consideration for a promise of payment to the assignee ; and where promise of payment is made to him, a suit may be maintained for the amount of the claim in the assignee's own name ; and it is immaterial whether the promise be before or subsequent to the assignment. *Ib.*

11. (*Time of performance.*) When a proposition is made as above, there must be a compliance within a reasonable time ; and what is a reasonable time, when the contract is silent upon the subject, is a question of law. Under the circumstances of this case, though a period of nearly two years had elapsed, a compliance within such time was holden to be reasonable. *Ib.*

12. (*Illegal.*) A contract, innocent in itself, will not be avoided because it may by possibility facilitate an illegal transaction ; to render it void, the connection with the illegal transaction must be direct, and not remote or conjectural, *De Groot v. Van Duzer*, 17 Wendell, 170.

**CORPORATIONS.** (*Money paid into bank.*) Where money paid into a bank is passed generally to the credit of the owner, and not placed or received as a special deposit, the bank do not hold the money as bailees, but the relation of debtor and creditor is created, and the money may be applied by the bank to the payment of any demand they may have against the depositor. *Albany Commercial Bank v. Hughes*, 17 Wendell, 94.

2. (*Liability of bank.*) If the bank be not a creditor of the depositor, and the money be lost, though without the fault of the bank, the depositor is entitled to payment. *Ib.*

**COVENANT.** (*Breach of.*) Where a lease was executed of a

mill site on a certain stream for a term of years, and the lessor covenanted that he would not let or establish any other place or site on the same stream to be used for sawing mahogany, it was held that a subsequent demise by the landlord to third persons of a mill site on the same stream, without limitation or restriction as to its use, and the establishment and use of a mill by the lessees under such second demise in the sawing of mahogany, was a breach of the covenant. *Norman v. Wells*, 17 Wendell, 136.

2. (*Running with the land.*) The covenant in this case not to let or establish any other site on the same stream to be used for sawing mahogany, was held to be a covenant running with the land, and that for the breach of it an action might be sustained by the assignee of the covenant. *Ib.*
3. (*Available to assignee.*) To render a covenant available to an assignee, it is not necessary that the act in respect to which the covenant is made should be done or omitted to be done on the demised premises ; it must, however, be touching or concerning the thing demised as affecting the reversion or the term or the rent. *Ib.*

**CRIMINAL LAW.** (*Proceedings under statute.*) In a proceeding under the statute to prevent the commission of crimes, where the examination of the complainant, reduced to writing, subscribed and sworn to by him, contains matter sufficient to authorize the issuing of a warrant of arrest, the justice who issues the warrant has jurisdiction, although no complaint in writing, separate and distinct from the examination, is made. *Bradstreet v. Furgeson*, 17 Wendell, 181.

2. (*Obtaining money by false pretences.*) An indictment will not lie for obtaining money by false pretences, where the money is parted with as a charitable donation, although the pretences moving to the gift are false and fraudulent. *The People v. Clough*, 17 Wendell, 351.
3. (*Bar to indictment.*) A trial and acquittal for robbery, is a bar to an indictment for larceny where the property alleged to have been taken is the same. *The People v. M'Gowan*, 17 Wendell, 386.

4. (*Identity.*) On a plea of *autre fois acquit*, where the only issue is the identity of the offences, a variance between the record of acquittal and the indictment under which the trial is had, in the number of articles charged to have been taken and in the names of the owners of the property, will be disregarded when no proof is offered on the part of the prosecution to show that the offences are in fact different. *Ib.*
5. (*Larceny.*) Where the personal property of one is, through inadvertence, left in the possession of another, and the latter *animo furandi* conceals it, he is guilty of larceny; knowing it to be the property of another, his possession will not protect him from the charge of felony. *The People v. M'Garren*, 17 Wendell, 460.
6. (*Indictment.*) In an indictment for selling spirituous liquors without license, it is not necessary to specify the names of the persons to whom the sales were made. *The People v. Adams*, 17 Wendell, 475.

**DAMAGES.** (*For breach of agreement.*) Where a party agrees to demise certain premises to another, who breaks up his establishment and proceeds with his family and furniture to the place where the premises are situate, and the landlord refuses to give possession, the tenant is entitled to recover the damages sustained by him by such removal of his family and furniture, although special damage is not alleged in the declaration. *Driggs v. Dwight*, 17 Wendell, 71.

2. (*Liquidated.*) Where the plaintiffs gave \$3000 for the patronage and good will of a newspaper establishment, and \$500 for the type and printing apparatus, and the defendants (the vendors) covenanted that they would not publish, or aid or assist in the publishing of a rival paper, and fixed the measure of damages at \$3000, the case, from its peculiar nature and the total uncertainty of arriving at a correct conclusion as to the amount of damages, was held to be a fit and proper one for the application of the rule that the sum agreed upon should be regarded as stipulated damages, and not as a penalty. *Dakin v. Williams*, 17 Wendell, 447.

3. (*Condition.*) Where an estate is granted subject to a condition, and the grantee is released from the performance of a part thereof, the whole condition is gone, and the estate is held free and discharged of the condition: not so in relation to a covenant not coupled with a condition—and it was accordingly held in this case, that the release of the defendants from their covenants, so far as to permit them to publish a paper of a peculiar character, directed to the accomplishment of a particular object, did not discharge them from responsibility for publishing or aiding in the publication of a paper different from that specified in the release. *Ib.*

**DEBT.** (*Against sheriff.*) Debt does not lie against the sheriff for the escape of a prisoner committed to prison on mesne process, when the escape is effected through the insufficiency of the gaol. *Lovell v. Bellows*, 7 N. H. 375.

2. (*Same.*) In such a case, nothing more than the actual damages sustained by reason of the escape, is to be recovered; and debt is not the proper action, when the demand is for unliquidated damages. *Ib.*

**DEED.** (*For benefit of creditors, in Maryland.*) It has been settled in Maryland, that a deed made by a debtor in failing circumstances to trustees, for the benefit of all his creditors is valid, as being founded upon a good and valuable consideration; and in such case, it is immaterial to the validity of the instrument, whether the intervening assent of the creditors to its execution is shown or not. *Houston v. Newland*, 7 G. & J. 480.

2. (*Same.*) If the deed is made directly to the creditors, their assent would be necessary, but if executed to trustees for their benefit, the legal estate passes to and vests in them, though the creditors are not assenting or parties to the conveyance. *Ib.*

3. (*Same.*) A deed made by a debtor in Delaware, to trustees for the benefit of his creditors in conformity with the laws of that State, but not executed, acknowledged and recorded, according to the laws of Maryland, will not operate to transfer real estate in the latter state; but such a deed, if it embrace the rights and credits of the debtor, will transfer to the trustees for the

benefit of his creditors, the balance of the purchase money of such real estate, where the debtor had previously to its execution contracted to sell the estate to a third person, received part of the purchase money, and given a bond to convey the legal title upon the payment of the whole thereof. *Ib.*

4. (*By attorney.*) Where a deed of land was made in the name of the principal, but executed by an attorney, as follows : "In testimony of the foregoing, I. W., being duly constituted attorney for the purpose, has hereunto set his hand and seal, I. W. and seal," it was held, that the instrument was sufficient to pass the estate of the principal. *Montgomery v. Dorion*, 7 N. H. 475.

5. (*Subsequent purchaser—Construction of statute.*) A statute declaring the omission to record a deed fraudulent and void as against a subsequent purchaser for valuable consideration, is subject to the same construction as a statute declaring such omission fraudulent and void as against a subsequent *bona fide* purchaser for valuable consideration ; and notice for the purpose of showing *mala fides* may, under the first as well as the second statute, be shown at law as well as in equity. *Van Rensselaer v. Clark*, 17 Wendell, 25.

**DEVISE.** (*Life estate.*) A devise to two daughters of land, "to be equally divided between them, share and share alike, and to be to them for and during their natural lives ; and after their death, then to be to their and each of their children, and to be divided between them share and share alike," gives life estates to the daughters with remainders to their respective children as tenants in common—the grand-children taking *per stirpes*, and not *per capita*. *Bool and wife v. Mix*, 17 Wendell, 119.

2. (*Conditional.*) A mere injunction upon or direction to a devisee, to pay a sum of money to a third person, without other words showing that a condition was intended, will not render the estate conditional ; but if a devise be to one, he paying to another a sum certain, such words, it seems, will create either a condition or limitation, as will be supposed best to supply the intent of the testator. *Fox v. Phelps*, 17 Wendell, 393.

**DOWER.** (*Estoppel.*) In an action of ejectment for dower,

where the defendant was a purchaser and entered into possession, by virtue of a conveyance from the grantee of the husband, it was held, that the defendant was estopped from showing that the husband had not title to the premises, and that he (the defendant) after his purchase from the grantee of the husband, on an action being brought against him by the real owner for the recovery of the land, had obtained by purchase the true and paramount title. *Browne v. Potter*, 17 Wendell, 164.

**EJECTMENT.** (*Non claim by grantee.*) The non claim by a grantee of an interest in land, for a period of thirty-four years after acquiring title, is, in an action against the heir of the grantor, no bar to a recovery ; nor does the exclusive possession of the land by the grantor and his heirs for that length of time afford *per se* the presumption of a reconveyance or surrender of the interest conveyed, as long as the nature of the possession is consistent with the rights of the grantee. *Butler v. Phelps*, 17 Wendell, 642.

**ELECTION.** (*Conflicting Claims.*) Where one party has a right of resorting to two funds, and another a right of resorting only to one, for the payment of his claim, the exercise of the right of election, by him who has it in his power to resort to two funds, shall not operate to the prejudice of the other party. *Schnebley and Lewis v. Ragan*, 7 G. & J. 120.

**EVIDENCE.** (*Admitted by inferior court.*) Where evidence is admitted to the jury in the court below without objection, it has and ought to have the same effect, as if admitted according to the strict rules of evidence. *Farmers' Bank of Md. v. Dwall*, 7 G. & J. 78.

2. (*To show nature of a devise.*) The nature of the estate passed by a will, must be determined from the face of the will alone—and parol evidence is inadmissible to shew, that the draftsman of the will was mistaken, and the testator designed something not expressed in the will. *Negro Cæsar v. Nat. Chew*, 7 G. & J. 127.

3. (*To support a deed.*) Parol evidence may be given of collateral and independent facts, which tend to support a deed, pro-

vided it is not offered to vary the agreement, and is consistent with the deed. *Dorsey v. Eagle*, 7 G. & J. 321.

4. (*Bill of discovery.*) Where a defendant filed a bill of discovery against the plaintiff, who answered, and the defendant read the bill and answer to the jury, the contents of the answer may be considered by the jury, so far as they credit them, as evidence of the plaintiff's right to recover. *Sowerwein v. Jones*, 7 G. & J. 335.
5. (*Dying without relations.*) The dying without relations within the fifth degree, may be established by circumstantial or presumptive proof. *Thomas v. Visitors Frederick county school*, 7 G. & J. 369.
6. (*Without oath.*) If a party admits proof to be taken in a cause without an oath, after it has been acted upon and made the basis of a judgment, he cannot object to its admissibility. *Nesbitt v. Dallam*, 7 G. & J. 494.
7. (*Proof of execution of deed.*) The subscribing witnesses to a deed, which was lost, resided out of the state. The supposed maker of the deed testified that a copy, which was produced, was a true copy of a deed made by the witness. It was held, that this evidence was competent to be submitted to a jury as proof of the execution of the deed. *Montgomery v. Dorion*, 7 N. H. 475.
8. (*Same.*) Where the subscribing witnesses to a deed resided in another state, the depositions of witnesses residing in such other state, proving the signatures of the maker of the deed and of the subscribing witnesses, were held to be proof of the deed—the subscribing witnesses having been absent from the country when the depositions were taken. *Ib.*
9. (*Same.*) A witness testified that the signatures to a certain deed, a true copy of which he annexed to his deposition, were those of the maker of the deed and the subscribing witnesses, of whom he was one; and that he saw the deed executed. A deed, of which the copy annexed to the deposition was an exact copy, was produced. It was held, that the deposition was competent evidence to be submitted to a jury to prove the execution of the instrument produced. *Ib.*

10. (*In assumpsit.*) Evidence that a party who had sown grain upon the land of another, under an agreement that he should have a share of the crop, afterwards agreed to give up his interest in the crop to the owner of the land, upon a promise of pay for what he had done in sowing it, will not sustain an action of indebitatus assumpsit for grain sold, and work and labor performed for the defendant. *Moore v. Rose*, 7 N. H. 528.

11. (*Assignment of bond.*) Where A promised B a certain consideration if he would procure to himself an assignment of a bond outstanding against A, it was holden that A was not liable on such promise, until such bond was produced, or shown to have been lost by B subsequently to an assignment to him. An assignment of the debt secured by said bond was holden to be no evidence of a compliance with the contract. *Morse v. Bellows*, 7 N. H. 550.

12. (*Competency of witness.*) A party liable for the costs of the defence in case of the failure of the plaintiff to recover, is notwithstanding a competent witness for the plaintiff if he hold a bond of indemnity against such costs, executed by a solvent obligor. *Lake v. Auburn*, 17 Wendell, 18.

13. (*Same.*) A person is not incompetent as a witness because he believes himself interested in the event of the suit; the court, and not the person called as a witness, must decide upon his competency. Objections arising from a supposed moral or honorary obligation, go merely to the credibility of the witness. *Commercial Bank of Albany v. Hughes*, 17 Wendell, 94.

14. (*Correspondence.*) Where a correspondence between the defendant and third persons has been produced and deposited, under a judge's order obtained by the plaintiff, and part of the correspondence is read in evidence by the plaintiff in support of his action, the defendant is entitled to have the whole of it laid before the jury. *Raymond v. Howland*, 17 Wendell, 389.

15. (*Letters.*) Where the letters of the correspondents of the defendant are relied upon as evidence in support of the action, the defendant is entitled to read his answers to such letters, so that the jury may pass upon the whole of the correspondence. *Ib.*

16. (*Competency of witness.*) A person not believing in the existence of a Supreme Being who will punish false swearing, is not a competent witness, but the objection to his competency must be taken before he is sworn. After he has testified, his disbelief may be shown, to affect his credibility. *The People v. M'Garren*, 17 Wendell, 460.

EXECUTION. (*Creditor may direct part to be collected.*) A creditor has a right to direct the officer to whom he delivers his execution not to collect the whole amount; and in such a case the sheriff has no authority to receive any more than he is directed to receive. *Rogers v. McDearmid*, 7 N. H. 506.

2. (*Same.*) And where a sheriff has such instructions, a tender to him of the amount of the execution and fees, is no bar to an action on the judgment. *Ib.*

EXECUTOR AND ADMINISTRATOR. (*Legatee of bond.*) At common law, the specific legatee of a single bill, could not sue for the money due on the bill in his own name, nor in the name of the testator, he being dead, nor in the name of his executor, when the executor was the obligor. So that in such a case, although the legatee could maintain replevin, he might at last, for remedy on the bill have been forced into chancery. *Kent v. Somerville*, 7 G. & J. 265.

2. (*Judgment of another state.*) A judgment of the state of Pennsylvania, conclusive between the parties in that state, and having a priority over bonds, single bills, and simple contract debts in that state, as against the assets of the defendant in the hands of his executor, is considered only as a simple contract debt in the distribution of assets in Maryland. *Brengle v. McClellan*, 7 G. & J. 434.

FEME COVERT. (*Acknowledgment of deed by, in Maryland.*) Under the act of 1715, ch. 47, the form of the acknowledgment to be taken by a feme covert, as grantor of a deed, is prescribed for her benefit; yet a literal compliance with the specified form has never been required. *Young v. The State*, 7 G. & J. 253.

FENCE. (*Liability in trespass.*) Where A and B own adjoining closes, the partition fence between which is not divided, each

is bound to keep his cattle on his own land at his peril. But if C, with A's assent, keep his oxen in A's pasture, and has the custody of them there, and they stray into B's close, C, and not A, is to be considered *quoad* the oxen as the occupier of A's close, and is liable for the damage. But it is otherwise if A has the custody of C's oxen, while they are in his close.

*Tewksbury v. Bucklin*, 7 N. H. 518.

**FRAUD.** (*Mortgaged personal property.*) An action will not lie against an officer for a levy by virtue of an execution upon personal property which has been mortgaged and remains in the possession of the mortgagor, where the levy is made before the mortgage becomes absolute. *Randall v. Cook*, 17 Wendell, 53.

**2.** (*Delivery—Statute of frauds.*) Where a purchase is made at an auction sale, at one time and from the same vendor, although the articles purchased are numerous, and are struck off separately at separate and distinct prices, the whole constitutes but one entire contract, and a delivery of part of the goods sold renders the sale valid for the whole, within the statute of frauds. *Mills v. Hunt*, 17 Wendell, 333.

**3.** (*Auctioneer.*) An auctioneer who sells goods as the mere agent of others, and does not at the time of the sale disclose the names of his principals, renders himself personally liable as the vendor of the goods; and in such case, although the goods sold belong to distinct owners, a delivery to the purchaser by one owner of his share of the goods, is sufficient to render the sale valid as to the goods of the other owner which are not delivered. *Ib.*

**INDIAN.** (*Deed by.*) A deed from an Indian executed and ratified in conformity to the laws of this state, is a valid and operative conveyance, notwithstanding the law of congress that no grant of lands from any Indian shall be valid unless made by treaty or convention entered into pursuant to the constitution of the United States. *Murray v. Wooden*, 17 Wendell, 531.

**INFANCY.** (*Deed of infant voidable.*) A deed of bargain and sale, made by an infant, is like a feoffment with livery of seizin, voidable only, and not absolutely void; and it seems, that the

rule is universal, that all deeds or instruments under seal executed by an infant are voidable only, with the single exception of those which delegate a naked authority: they are void. *Bool v. Mix*, 17 Wendell, 119.

2. (*Time of avoiding.*) A deed of lands executed by an infant cannot be avoided until he come of age, though he may enter and take the profits in the meantime; but it seems, a sale and manual delivery of chattels by an infant may be avoided while under age. *Ib.*
3. (*Disaffirmance of deed.*) Before suit brought for the recovery of the possession of lands conveyed in infancy, the party must make an entry upon the land and execute a second deed to a third person, or do some other act of equal notoriety in disaffirmance of the first deed, such as demanding possession or giving notice of an intention not to be bound by the first deed, or an action cannot be sustained. *Ib.*
4. (*Same.*) If there be a feoffment with livery, it may be avoided by entry or by writ *dum fuit infra etatem*. If a deed of bargain and sale be executed, it may be avoided by another deed of bargain and sale made to a third person without entry, in case the land be vacant and uncultivated; but in all other cases there must be an actual entry, for the express purpose of disaffirming the deed. *Ib.*

INFANT. (*Liability of to surety on note.*) If an infant purchase necessaries, and give a promissory note, signed by himself and a surety, and the surety afterwards pays the note, he is entitled to recover the amount so paid, of the infant. *Conn v. Coburn*, 7 N. H. 368.

2. (*Same.*) And the cause of action arises when the surety pays the note. *Ib.*

INSURANCE. (*Distinct voyages.*) An insurance for a premium for the voyage round, at and from B to C, with the privilege of one other port in the same island with C, and at and from either of them back to C, on freight laden, or to be laden, valued at the sum insured, is upon separate and distinct voyages, during the prosecution of which, distinct freights were at risk;

and to each of which, as they successively came into existence, the whole valuation in the policy ought to be applied, and a total loss on the homeward voyage paid for accordingly. *Patapsco Insurance Company v. Biscoe*, 7 G. & J. 293.

2. (*Abandonment.*) An abandonment can only operate upon the property or thing saved at the time a loss occurs; not upon that which is safe and no longer exposed to the perils insured against. *Ib.*
3. (*Re-insurance.*) Under the general powers conferred to make contracts of insurance, and all kinds of insurance, an insurance company is authorized to make re-insurance, which operates not upon the risk, but upon the property covered by the original policy. *New York Bowery Fire Insurance Company v. New York Fire Insurance Company*, 17 Wendell, 359.
4. (*Assignment of policy.*) Where a party, who had procured insurance against loss by fire upon buildings owned by him, assigned the policies with the assent of the insurers to secure a mortgage debt owing by him, and a loss having occurred, a suit was brought on the policies in the name of the assured, and judgment obtained by the assignee, who, instead of enforcing payment of the judgment coerced payment of the mortgage by a foreclosure in chancery, it was held, that the assured was entitled to the benefit of the judgment against the insurers, although he had procured other insurance upon the same buildings, and had omitted to give notice thereof: it appearing that such second insurance was effected subsequent to the assignment, and whilst the beneficial interest in the policies was in the assignee. *Robert v. The Traders' Insurance Company*, 17 Wendell, 631.

INTEREST. (*Calculation of, in Maryland.*) The calculations or deductions of interest according to Rowlet's tables were in all cases legalized by the act of 1826, ch. 90. *Duvall v. The Farmer's Bank*, 7 G. & J. 44.

LIBEL. (*Special damage.*) A publication charging a malster with using filthy and disgusting water in the malting of grain

for brewing, is libellous, and an action may be sustained without showing special damage. *White v. Delavan*, 17 Wendell, 49.

2. (*On a class of persons.*) But an action for a libel does not lie for a publication alleged to affect the individual characters of persons and the trade or business carried on by them, if on its face it does not point at the individuals intended, otherwise than that they pursue a particular trade or business in a specified section of a city ; the publication affecting a class of persons, no individual of that class is entitled to sustain an action for the publication. *Ib.*

3. (*On candidate for public office.*) A publication of and concerning a candidate for an elective office, is libellous, which charges that he had bartered away a public improvement, (e. g. a railroad) in which the constituency for whose suffrages he is a candidate had a deep interest, for the charter of a bank to himself and his associates ; and that, if elected, he would be an unfaithful representative and act counter to the interest of his constituents ; that he would by criminal indifference or treachery seriously retard or totally prevent the construction of such railroad—and that he would do all this from motives of personal political aggrandizement, or to accomplish some sinister and dishonest purpose, or to gratify his private malice. *Powers v. Dubois*, 17 Wendell, 63.

4. (*On member of legislature.*) An action lies for the publishing of a libel, imputing to a party corrupt conduct in his character as a member of the legislature, although the libel be published after the expiration of the term of office of the party slandered. *Cramer v. Riggs*, 17 Wendell, 209.

LICENSE. (*Statute of frauds.*) A license, or privilege, to be exercised upon land, is not within the statute of frauds ; and may be granted without a contract in writing. *Woodbury v. Parshley*, 7 N. H. 237.

LIMITATIONS, STATUTE OF. (*On action to recover deposits of a bank.*) A publication of unclaimed deposits remaining in a bank, made in pursuance of the statute, is an acknowledgment of indebtedness to the several persons named as depositors, from

which a new promise will be implied in case the statute of limitations is interposed as a defence to an action for the recovery of a deposit. *Adams v. Orange County Bank*, 17 Wendell, 514.

2. (*Same.*) If circumstances exist excusing the bank from the payment of a particular deposit, it seems they should be stated in the publication to prevent its operation as an unqualified admission of indebtedness. *Ib.*

3. (*Same.*) Previous to an action for the recovery of a deposit, a demand of payment must be made. *Ib.*

**MANUMISSION OF SLAVES.** (*In Maryland.*) By the act of 1796, ch. 67, sec. 29, a right is given to manumit slaves, of the description therein mentioned, by deed, so that such manumission be not in prejudice of creditors. *T. Allein v. Negro Jim Sharp*, 7 G. & J. 96.

2. This act has furnished the standard by which the validity of deeds of manumission is to be tested. The rule is, that they are not available, if made to the prejudice of creditors. The cases of deeds, fraudulent with reference to creditors, either at common law or under the statute of Elizabeth, do not apply to deeds of manumission. *Ib.*

3. The *onus probandi* in a cause impeaching the validity of a deed of manumission, as being in prejudice of creditors, is upon the creditor. The slave manumitted by it, is not called upon to prove the grantor's solvency, as a condition precedent to his right to freedom. *Ib.*

4. In a judicial proceeding to determine the invalidity of a deed, the party manumitted is entitled to the assistance of the heir at law, or person holding the real estate of the grantor in taking an account of the amount thereof, before it can be legally ascertained, that the deceased died insolvent, without subjecting the manumitted slave to the payment of his debts. *Ib.*

5. The judgment of freedom, upon a petition of freedom between a manumitted slave and the administrator of the former master, will not conclude the right of a creditor of the master to show in equity, that the deed of manumission was made in prejudice of creditors. *Ib.*

6. According to the true construction of the act of 1796, ch. 67, the law charges the whole of a manumitter's property with the payment of his debts in favor of his manumitted slave. *Ib.*
7. An executor who is also a creditor, is not entitled to hold a manumitted slave of his testator debtor, as a slave, or treat him as assets. He must resort to his legal remedy to vacate the deed of manumission. *Ib.*
8. That remedy is in a court of equity, where all persons interested in the real and personal estate of the master, should be made parties where an account will be taken, and a decree passed to sell the manumitted slaves, either for life, or for a term of years, as circumstances or the nature of the case may require. *Ib.*
9. Upon a petition for freedom, it belongs to the jury to find, whether the petitioner, at the time of manumission, was under the age of forty-five years, and able to work and gain a sufficient livelihood and maintenance; and it is error in the county court, where by the form of their instructions, those facts are withdrawn from their consideration, and assumed by the court. *Ib.*

**MASTER AND SERVANT. (Joint liability.)** Where a servant, by the command of his master, does an apparent wrong to a third person, both the master and the servant are liable.

*Hill v. Caverly*, 7 N. H. 215.

2. **(Servant's liability.)** But a servant or deputy is not liable to a third person merely for not doing that which it was the duty of the master to do. *Ib.*
3. **(Same.)** Thus, where a master, having an unsafe and insufficient dam across a stream of water, ordered his servant to shut the gate and keep it shut until ordered to raise it, and the servant obeyed the order, by means of which the water was raised so high that the dam broke away, and an injury was done to a third person, it was held that the servant was not liable. *Ib.*

**MORTGAGE. (Conveyance when deemed.)** Where a conveyance of land is made upon condition that it shall be void upon the payment of a sum of money by the grantor, if the conveyance is in fact made to secure the payment of a debt for which

the grantee has a remedy against the person of the debtor, the conveyance is to be deemed a mortgage. But where the conveyance is not intended as a security, it must be deemed a conditional sale. *Page v. Foster*, 7 N. H. 392.

**NEW TRIAL.** (*Negligence.*) A party who knows of proof within his power and neglects to produce it, cannot call upon a court of law for a new trial. *Kent v. O'Hara*, 7 G. & J. 212.

**2.** (*Granted in capital case.*) After a conviction, in a capital case, the court has power to grant a new trial, upon motion of the prisoner, if sufficient cause is shown. *State v. Prescott*, 7 N. H. 287.

**3.** (*Costs.*) Where a verdict is set aside as unsupported by the evidence, a new trial is granted only on payment of costs *Bank of Utica v. Ives*, 17 Wendell, 501.

**PARTIES TO ACTION.** (*Joint action.*) A joint action does not lie against separate owners of dogs, by whom the sheep of a third person have been worried and killed. *Van Steenburgh, v. Tobias*, 17 Wendell, 562.

**PARTNERSHIP.** (*Private debts of partner.*) A sheriff cannot seize and sell partnership property, upon an execution against one of the partners, for his private debt. The creditor can have only the right of his debtor, which is an interest in the surplus, after paying the partnership debts. *Gibson v. Stevens*, 7 N. H. 352.

**2.** (*Note by partners.*) A note given by a member of a firm in the name of the firm for the accommodation of a third person, and put into his hands for the purpose of raising money thereon is, in the hands of a *bona fide* holder, obligatory upon all the members of the firm. *Vernon v. The Manhattan Company*, 17 Wendell, 524.

**3.** (*Dissolution of.*) Where such note is discounted by a bank as an accommodation note, and the amount of the loan reduced from time to time by renewals, in an action upon the last of the series of notes, the dissolution of the firm in the interval of time between the dates of the two last notes, cannot be set up in bar of a recovery by a member of the firm not actually concerned

in the making of the last note, unless actual notice of the dissolution be brought home to the bank; a publication of notice of the dissolution, in a newspaper taken at the bank, is not sufficient notice. *Ib.*

4. (*Same.—Notice.*) Under such circumstances, the makers of the note will be considered dealers with the bank, and consequently actual notice of the dissolution, or what will be deemed equivalent, must be shown to prevent a recovery. *Ib.*

**PAYMENT.** (*Of note.*) G., holding a note against S., drew an order upon him for a certain sum in favor of I. S., which order was accepted by S., and the amount endorsed upon the note. Although the order was never paid by S., yet as it did not appear that it had ever returned to the hand of G., it was held to be payment, *pro tanto*, of the note. *Shaw v. Gookin*, 7 N. H. 16.

**POSSESSION.** (*Of land for twenty years.*) If the proprietors of a township enter into a tract of land, and continue in possession for twenty years, claiming the land under a charter which does not in fact cover it, this does not constitute a title, nor can the possession be deemed adverse to the title of the true proprietor.

*Proprietors of Enfield v. Day*, 7 N. H. 457.

**POWERS.** (*How executed.*) Where an authority is given by law to three or more persons, it may in general be executed by a major part of the persons to whom it is delegated; but where corporations or individuals give an authority jointly to three or more persons, in order to bind the principal all the agents must act. *Jewett v. Altan*, 7 N. H. 253.

**PRESCRIPTION.** (*Custom.*) The inhabitants of a town or village cannot claim a right to take sand to mix with lime, for the purpose of making mortar, from the land of another, as a custom. Such a right is a profit in another's land, and must be plead in the individual and his ancestors, or through a corporation and its predecessors, or in a *que estate*, as a prescription. *Perley v. Langley*, 7 N. H. 233.

**PRINCIPAL AND AGENT.** (*Personal liability of state agent.*) A superintendent of repairs on the canals of this state, although an agent of the state, is personally liable in an action on the

case for damages sustained by an individual through the negligence of workmen employed in making repairs. *Shepherd v. Lincoln*, 17 Wendell, 250.

**PRINCIPAL AND SURETY.** (*Evidence.*) Where, on a partition between the joint owners of land, one released to the other his interest in the moiety of a certain lot, covenanting, if it should thereafter appear that their grantor had no title to the lot, and a recompense could not be obtained from him in a reasonable time after his title should be found defective, that he would pay to his co-proprietor the value of the one half of the lot; and the title did prove defective—it was held, in an action on the covenant, that to entitle the plaintiff to recover, it was only necessary to prove the defect of title, demand of recompense from the grantor, failure to obtain it, or an excuse for the omission of the demand and notice to the covenantor; and that it was not incumbent upon the plaintiff to show that recourse had been had by due course of law against the original grantor to obtain recompense for the lot. *Morris v. Wadsworth*, 17 Wendell, 103.

2. (*Damage.*) It was held in this case, that the plaintiff was entitled to recover the value of the moiety of the lot at the date of the covenant, and was not limited to the consideration money expressed in the deed from the original owner. *Ib.*
3. (*Guaranty.*) Where a party draws an order on a merchant, directing him to furnish goods out of his store to a third person to the amount of seventy dollars, engaging to be accountable for such sum, and requesting the amount of the bill to be sent to him; and the merchant furnishes the goods to such third person to the amount of \$102,81, and takes his note at thirty days, no right of action accrues under the guaranty; by the giving of credit, the guarantor is discharged from liability. *Hunt v. Smith*, 17 Wendell, 179.
4. (*Same.*) A party who was engaged to guarantee the payment of the paper of another, made payable at a particular bank, is not liable upon a note drawn by such party, although it be deposited for collection in the bank specified in the guaranty, pre-

vious to its maturity, and notice thereof given to the guarantor ; the claim against a surety is *strictissimi juris*. *Dobbin v. Bradley*, 17 Wendell, 422.

**RIGHT OF WAY.** (*Over land of grantor.*) It does not necessarily follow from the bare fact, that a party is without a right of way except over the defendant's land, that he thereby acquires a right of way from necessity according to the principles of the common law. *Brice v. Randall*, 7 G. & J. 349.

2. (*Same.*) When the owner of a large tract of land grants a portion of the soil, which is surrounded by his own land, the right of way incidental to the grantee's land, is to a convenient way over some part of the grantor's surrounding land, not in every part of it. *Ib.*

**SALE OF CHATTELS.** (*Implied warranty.*) A general sale of merchandise for a sound price, does not raise an implied warranty that the article is fit for all the purposes to which it is ordinarily applied ; thus, where a starch manufacturer bought a quantity of flour at the highest market price, without disclosing the use for which it was intended, and after delivery found that it was made of grown wheat, which rendered it unprofitable to be made into starch, and unfit for bread for ordinary use, but still was valuable for other purposes, it was held, that an action did not lie against the vendor on an implied warranty that the flour was fit for all the ordinary purposes for which flour is used *Hart v. Wright*, 17 Wendell, 267.

2. (*Same.*) It was also held, that a warranty could not be implied from the difficulty of ascertaining the quality of the flour, although it was as fair to appearance as the best flour, and could not be known by mere inspection to be made of grown wheat. *Ib.*

3. (*Stoppage in transitu.*) Where a party, residing at a distance from his correspondent, ordered a quantity of merchandise, directing it to be forwarded to an intermediate place, and the goods were accordingly forwarded ; and after their arrival at the intermediate place were delivered to a common carrier, employed by the purchaser, but before reaching his residence

the possession of the goods was resumed by the vendor on the ground of the insolvency of the purchaser ; it was held, that the goods not having arrived at the place of their final destination, the transitus was not ended, and the vendor had a right to stop and detain them until their price was paid ; and that he might do so, notwithstanding that a portion of the goods ordered had been actually received by the purchaser at his residence, previous to the exercise of the right of stoppage as to the residue. *Buckley v. Furniss*, 17 Wendell, 504.

**SALES OF PERSONAL PROPERTY.** (*Delivery*) The vendor gave a receipt to the vendee's agent for a sum of money "in full payment for" his slave, whom he warranted to be sound in body and mind, and a slave for life ; and at the same time he gave the agent an order on the sheriff of the county to deliver the negro, then confined in the jail for safe keeping. When the agent arrived at the jail, it was ascertained that the negro had cut his throat, and soon after died. In an action brought by the vendee to recover back the purchase money, it was held to be the intention of the parties, that the transaction should be consummated by the delivery of the slave ; that the contract was for the purchase of a living and sound slave, and if he had cut his throat before the contract was made, which was a question for the jury, the vendee had a right to rescind the contract, and recover back the purchase money. *Franklin and Armfield v. Long*, 7 G. & R. 407.

**SET OFF.** (*In action by executor.*) In an action by an executor to recover a debt which has accrued to him as such after the death of his testator, a debt due to the defendant from the testator is not a set-off. *Shaw v. Gookin*, 7 N. H. 16.

**SHERIFF.** (*Damages in action against.*) In an action on the case against a sheriff for a negligent and not a voluntary escape, the measure of damages is the actual loss or injury sustained by the plaintiff ; *prima facie* the plaintiff is entitled to recover the amount of his judgment against the prisoner, but the defendant is at liberty to give evidence of the poverty of the prisoner or other circumstances tending to show the actual damage

of the plaintiff, to which the jury are authorized to limit the verdict. *Patterson v. Westervelt*, 17 Wendell, 543.

**STATUTE OF FRAUDS.** (*Trusts.*) The statute does not provide that trusts shall be constituted by writing, but that they shall be proved by some writing signed by the party who creates them. It is not material that the declaration of trust be signed at the time of its creation. Trusts and confidences by implication or construction of law, are excluded by the 8th section from the operation of the statute. *Maccubbin v. Cromwell*, 7 G. & J. 157.

2. (*Agreement for sale.*) A mere naked verbal agreement of one party to purchase a slave, for a stipulated sum: and of another party to deliver the slave on the payment of the sum, with no delivery, actual or constructive, nor any thing given in earnest to bind the bargain, nor any payment on account of it, is void under the statute of frauds. *Franklin and Armfield v. Long*, 7 G. & J. 407.

**SURETY.** (*Of a trustee.*) The sureties of a trustee appointed by the court of Chancery to sell mortgaged property, have no official duties to perform, assume no responsibility to the Court; but in general enter into a merely pure legal contract of suretyship, incapable of coercion, except through the medium of the appropriate forum for the enforcement of such contracts—a legal tribunal. *Boteler and Belt v. Brookes*, 7 G. & J. 143.

**TRESPASS.** (*Interest of Plaintiff.*) An action of trespass *quare clausum fregit* may be sustained upon a temporary interest in the plaintiff, but it must also be an entire or exclusive interest. *Dorsey v. Eagle*, 7 G. & J. 321.

2. (*Right of ingress and egress.*) The right of ingress and egress in an outgoing tenant, after the determination of his lease, for the purpose of gathering and taking away the growing crops, will not enable a party to maintain trespass *q. c. f.* against the succeeding tenant, who has a right to seed down the field, on which such crop stands, before it comes to maturity. *Ib.*

3. (*Where land is leased.*) Lessor for years cannot maintain trespass *quare clausum fregit* for an entry upon the land during

the term, and while it is in possession of the lessee. *Anderson v. Nesmith*, 7 N. H. 167.

4. (*Land occupied by servant.*) But the owner of land may maintain trespass for an entry upon it while in the occupation of his servant. *Robertson v. George*, 7 N. H. 167.

5. (*Plaintiff's title.*) In trespass *de bonis asportatis*, possession is enough to sustain the action. *Hanmer v. Wilsey*, 17 Wendell, 91.

6. (*Same.*) It is no defence in such action to show property out of the plaintiff, in a stranger; and it was accordingly held in this case, that evidence that the plaintiff had given a mortgage of the property which had become forfeited, was inadmissible, without showing a connection between the defendant and the mortgagee. *Ib.*

**TROVER.** (*Evidence of conversion.*) A deposited in the hands of B certain promissory notes to be collected. Soon afterwards, process of foreign attachment was served upon B, as the trustee of A. A then demanded the notes of B, who refused to deliver them, on the ground that he had been summoned as the trustee of A. In an action of trover brought by A against B for the conversion of the notes, the refusal by B to deliver the notes was held not to be evidence of a conversion. *Fletcher v. Fletcher*, 7 N. H. 452.

**USURY.** (*Intention.*) Usury depends on intention, and it does not necessarily follow from taking greater interest than allowed by law, that usury is established. When too much interest is taken by mistake or error, usury cannot be deduced. The jury must find an intention to take more than legal interest. *Duvall v. The Farmer's Bank of Maryland*, 7 G. & J. 20.

**VENDOR AND VENDEE.** (*Agreement to procure a conveyance of land.*) Where a vendor covenanted to procure from a third person a good and sufficient warranty deed of conveyance in the law in fee simple of a definite quantity of land, together with certain water rights and privileges appurtenant to the land, particularly enumerated in the contract, and to deliver the deed by a fixed day to the purchaser; who, on receiving the same,

had agreed to pay part of the consideration money, and to secure the residue by bond and mortgage: it was held, in an action by the vendor against the purchaser to recover a part of the consideration money, that in reference to the peculiar terms of the contract in this case, a plea of want of title in the grantor was a good and sufficient answer to the declaration: in other words, that the plaintiff was bound to procure a deed not only corresponding in form with that stipulated for, but operative and effectual to convey the title. *Carpenter v. Bailey*, 17 Wendell, 224.

**WARRANTY.** (*On the sale of chattels in Maryland.*) It is the received doctrine in this State that if a person sells an article with a warranty of soundness, which turns out to have been unsound at the time of the sale and warranty, the buyer may either keep the article, and bring an action on the warranty; or rescind the contract by a return of the article, or offer to return it in a reasonable time, so that the vendor is placed *in statu quo* and sue for and recover back the purchase money, or so much as he has paid, in an action for money had and received. *Franklin and Armfield v. Long*, 7 G. & J. 407.

**WILLS AND TESTAMENT.** (*Nature of estate devised.*) The nature of the estate passed by a will, must be determined from the face of the will alone—and parol evidence is inadmissible to show, that the draftsman of the will was mistaken, and the testator designed something not expressed in the will. *Negro Cæsar v. Nat Chew*, 7 G. & J. 127.

2. (*Revocation.*) A testamentary paper, which professes to cancel a former will, dispose of the balance of the testator's estate after the payment of his just debts, and directs that none of his slaves shall be sold out of the state, cannot be considered merely as a revocation, and must be established by the same proof as is demanded for a will. *Deakins v. Hollis*, 7 G. & J. 311.

## III.—MISCELLANEOUS CASES.

*In the District Court of the United States, for the district of Maine, Aug. 18, 1838.*

THE MARY :—BLANCHARD, MASTER.

[Introductory Note.]

A mariner is entitled to his wages as soon as he is voluntarily discharged from the vessel; and if not paid within ten days after his discharge he may have process from a court of admiralty against the vessel to enforce the payment.

Whether the seamen are bound to remain by the vessel after the voyage is ended and assist in discharging the cargo depends on the custom of the port.

If a vessel has not the quantity and kind of provisions required by the act of Congress of July 20, 1790, sect. 9—and the crew are put on short allowance, they are entitled to double wages for every day that the short allowance is continued.

But when the master is unable to obtain the kind of provision which the statute names, other kinds may be substituted as equivalents.

When the crew are put upon an allowance and there is a controversy whether it be short or not, the navy ration is assumed as the standard of a proper allowance.

THIS was a suit for subtraction of wages. The libel set forth a contract for a voyage from Portland to Goree in Africa and the Cape de Verd Islands and back to her port of discharge in the United States, for wages at the rate of eighteen dollars a month, alleges the faithful performance of the contract and claims a balance due of \$48 08. In another article the libellant claims extra wages in consequence of being put on short allowance of provisions for twenty-two days during the return voyage. The answer of the owner admits the contract, the service and the balance due as alleged in the libel, and avers that he is and always has been ready to pay the sum, and brings the money into court, and alleges that the libellant has never demanded it. The answer denies that the crew was put on short allowance, and avers that they were at all times supplied with a sufficient quantity of good and wholesome provisions of the kind usually furnished in such voyages. The

answer also contains an allegation that at the time when the libel was filed in this court, ten days had not elapsed since the discharge of the crew.

The cause was argued by HAYNES for the libellant, and by Fox for the respondent. The material facts are stated in the opinion of the court.

*WARE, District Judge.* The first question raised by the pleadings in this case, in the natural order in which they present themselves, is whether the suit is prematurely instituted. The allegation of the answer on this point is incorrect in point of form, but if the facts bring the case within the exception it is susceptible of amendment. The statute does not prevent the filing of a libel before the expiration of ten days, but the issuing of process against the vessel. Whether this objection is available for the respondent upon the facts as they are proved, depends on the instruction of the sixth section of the Act of July 20th, 1790. The particular clause fixing the time when admiralty process may be issued against the vessel provided the wages are not paid, has been thought to be not of very easy interpretation. It is in these words. "As soon as the voyage is ended, and the cargo or ballast fully discharged at the last port of delivery, every seaman or mariner shall be entitled to the wages which shall then be due according to his contract: and if such wages shall not be paid within ten days after such discharge, or if any dispute shall arise between the master and seamen, or mariners, touching the said wages, it shall be lawful" &c. And at the close of the section it is further provided, "that nothing herein contained shall prevent any seaman or mariner from having or maintaining any action at common law, for the recovery of his wages, or from immediate process of any court having admiralty jurisdiction, wherever any vessel may be found, in case she shall have left the port of delivery where her voyage ended before payment of the wages, or in case she shall be about to proceed to sea before the end of the ten days next after the delivery of her cargo or ballast."

One difficulty in the construction of the act is supposed to arise from coupling the two phrases, as soon as the voyage is ended,

and the cargo or ballast is fully discharged. The statute seems to have been framed upon the idea, either that these two phrases are identical in their meaning, the latter being added as merely exegetical of the former; or that by the principles of law the seamen are bound to remain with the vessel until the cargo is fully discharged. But it is quite clear that in the maritime sense of the word, the 'voyage is ended when the vessel has arrived at her last port of destination, not always her last port of delivery, and is safely moored at the wharf.<sup>1</sup> The cargo may have been delivered at another port, and thus the discharge of the cargo happens before the end of the voyage, yet the seamen are unquestionably bound to bring her to her last port of destination, and their wages will not be due by their contract until that time; or what is more common, the last port of delivery may be the last port of destination, and then the voyage will be ended before any part of the cargo is discharged. And further, admitting, what is not perhaps quite clear, that the seamen are by the general principle of the marine law applicable to their contract, bound to remain by the vessel and assist in discharging the cargo, the general principle may be controlled by an established usage to the contrary. In this port and it is believed in most of the ports of the United States,<sup>2</sup> the uniform custom on the return of a vessel from a foreign voyage, is to discharge the crew before unloading the vessel and employ other persons to perform that service. It is a custom so uniform, general, and of so long standing, that it may fairly be considered as entering into a making part of the implied terms of the contract. The end of the voyage and the delivery of the cargo do not therefore refer to the same time according to the established usage of this port. The end of the voyage is when the vessel has arrived and is safely moored at the wharf, or when the master has provided other men to take the place of the crew and assist in unloading the cargo. The owner in the present case acted upon this custom. The vessel arrived in the afternoon of Saturday the 28th of July—and the crew were discharged the

<sup>1</sup> 1 Sumner, 376; *Cloutman v. Tunison*; 1 Peters's Ad. R. 165; *The Susan*.

<sup>2</sup> *Dunlap's Ad. Pr.* 98.

same day. Their wages were made up including and terminating with that day, and some of them paid on Monday. The sum brought into court and admitted to be due to the libellant includes Saturday only, and no complaint is made that he left the vessel before the voyage was ended, or that he had not completely performed his contract. It is manifest therefore that both the owners and the seamen considered the voyage for which they contracted as ended when the ship was made fast to the wharf and before the discharge of the cargo.

The statute declares that when the voyage is ended, and the cargo or ballast discharged, the seamen shall be entitled to their wages. If by the terms of the contract or the usage of the place, the seamen are bound to remain in the vessel and assist in unloading the cargo, then on common principles they will not be entitled to their wages until the cargo is discharged. The contract is entire, and they are not entitled to their pay until it is completed. But if by the terms of the contract or the usage of the place, their term of service and with it their wages terminate with the end of the voyage, and before the unloading of the vessel, then on the same principle they are entitled to their wages when their term of service expires. In such a case when do the ten days begin to run; is it from the end of the voyage or from the discharge of the cargo. It cannot be from both. My opinion is that the intention of the legislature was, that they should begin to run from the time when the wages become due, that is from the day when the term of service is completed. They are then of common right entitled to their pay. The statute couples the two phrases, the end of the voyage and the discharge of the cargo at the last port of delivery, and declares that the seamen shall then be entitled to their wages. Now it cannot without violence be presumed that the legislature intended to establish any new and peculiar principles of law to be applied to contracts of seamen in this particular. But if it is contended that the time begins to run from the time when the cargo is discharged at the last port of delivery, and that is not the port of final destination where the voyage ends according to the contract, then the statute would declare the wages to be

due before the contract was fully performed. If the final port of destination is the last port of delivery, and by the usage of the place the term of service expires with the end of the voyage, that is, when the vessel is safely moored at the wharf, then a similar inconvenience will result in an opposite sense, and the legislature will be made to declare, that the wages are not due until an indefinite period after the contract has been fully performed, that is, until the cargo is completely discharged. The difficulty will be avoided by holding that the time runs from the day the men are discharged. The wages are then completely earned and of common right are due, and this I think was the intention of the legislature. This is the construction which has been given to the statute by judge Peters.<sup>1</sup> It is also the settled construction of the statute in Massachusetts district.<sup>2</sup> And though some hesitation has been expressed as to the soundness of this construction, it appears to me to be open to fewer objections than any other.<sup>3</sup> In the present case process was not issued until after the expiration of ten days including the day of discharge.

We come then to the principal question in the cause, whether any extra wages are due in consequence of the crew being put on short allowance. By the 9th section of an act of July 20, 1790, every vessel of 150 tons burthen or more, bound on a voyage across the Atlantic, is required to have one hundred pounds of salted meat and one hundred pounds of bread for every person on board, independent of any other stores of live stock which shall be put on board by the master or passengers, and in a like proportion for a longer or shorter voyage ; and if not so provided, and the crew shall be put on short allowance, then each of the crew shall be entitled to one day's wages extra for every day they shall be kept on short allowance.

It is admitted, that there was not in this case the quantity of pro-

<sup>1</sup> 1 Peters's Ad. R. 165, the ship *Susan* ; id. 210, the *Philadelphia* ; id. 255, the *Happy Return*.

<sup>2</sup> Holmes *v.* Bradshaw, District Court of Massachusetts, Dec. 1823 ; Dunlap's Ad. Pr. 99.

<sup>3</sup> Abbott on Shipping, 450.

visions on board which is required by law, and it is also proved and admitted, that during part of the time on the return voyage the crew was put on an allowance, but it is denied that it was a short allowance. The law fixes with precision the amount and kind of provisions which a vessel is required to have on board. In its terms it does not admit of any substitutes for the kinds prescribed. But courts have thought, that when a vessel happens to be in a port, where it is not in the power of the master to obtain provisions of the amount and description directed by the law, other articles may be substituted which are of equivalent value.<sup>1</sup> This temperament has been introduced in the construction of the statute, upon the reasonable presumption that the law does not intend to require of the master impossibilities. But when the courts by an equitable construction have introduced a qualification and liberated the owners from the penal operation of the law against its letter, they are bound to see that the substitutes offered are a full equivalent both in quantity and quality, for that required by the text of the law; the more so as the policy of the law addresses itself so strongly to the interests of humanity, it being intended to guard against the dreadful sufferings of famine, while the ship's company are isolated from all the world and under a positive impossibility of relieving themselves.

This vessel on her departure from cape Bonavista had considerably less than half the amount of bread and salted meat required for a vessel crossing the Atlantic. And all that she had which can fairly be considered as a substitute was less than one fourth of a barrel of flour and about half a barrel of beans. The whole live stock was one pig and three goats, with about a bushel of corn to feed them, but this is expressly excluded from being admitted as a substitute for salted provision. It is unnecessary to waste words to prove, that these trifling stores could be no equivalent for the deficiency of the bread and salted meat. The master endeavored to replenish his stores at cape Bonavista, but provisions could not be purchased at any price. He was obliged to sail with what he had, and nine days after leaving port the men were put on an

<sup>1</sup> 1 Peters's Ad. R. 219; the Washington.

allowance of three biscuit a day, and a few days after, on an allowance of one pound of beef.

Whether the required quantity of provisions is on board or not, it is the duty of the master to oversee and regulate their expenditure. It does not follow, because they are dealt out in fixed and limited quantities, that the men are put on short allowance. It must be shown, that the allowance is not in a reasonable amount, enough for the ordinary consumption of a man. What that reasonable quantity is, has not been determined by the statute. But in fixing the rations of the army and navy, the legislature has shown what they consider a proper allowance. The army ration is fixed at one pound and a half of beef or three quarters of a pound of pork and eighteen ounces of bread, by the act of 16th March, 1802, ch. 9, sec. 6. The navy ration varies with the different days of the week, and is not made up exclusively of bread and meat, but is on the whole rather larger than that of the army.<sup>1</sup> A seaman in the merchant service requires as much food as one in the navy, and the navy ration has been assumed as the standard, by which the allowance in the merchant service ought to be regulated.<sup>2</sup> In the present case, the allowance was one pound of beef, and at most not more than twelve ounces of bread. This is precisely two thirds of the army ration, and a little less than that proportion of the ration for the navy. To make up this deficiency, there was for the whole passage of thirty-two days, not more than forty pounds of flour and about half a bushel of beans to be divided among nine persons. This would make but a very small addition to the allowance, and if we assume the navy ration as the standard, it is quite clear the men were on a short allowance.

But it is urged as an argument that the allowance was sufficient, that some of the men did not consume the whole of what was allowed. This is true; but it should be added, that they took care to have their savings carefully locked up in their chests. They knew that their stock of provisions was short, and that it was alto-

<sup>1</sup> Act of March 3d, 1805, chap. 91, sect. 3d.

<sup>2</sup> 1 Peters's Ad. R. 219, the Washington; id. 223, the New Jersey.

gether uncertain when they would obtain more, and how long they would be under the necessity of sustaining life on what they had. It was therefore prudent and natural, that they should practise the utmost frugality, and save all that could be spared from the urgent calls of nature, against a time of need which they might reasonably have contemplated as not a very remote possibility ; for if the voyage had been prolonged but a few days more, the crew must have suffered from absolute famine. I have no doubt that it was owing to unexpected contingencies, that the vessel was left with this short supply of provisions, and not to a want of ordinary prudence or forecast on the part of the owners. Their intention was to have had an addition made to her stores for the return voyage in a foreign port. But unfortunately and without any fault on their part, they could not be obtained. A court, however, which is bound to administer the law, cannot take these circumstances into consideration. The text of the law is imperative, and it is framed in the spirit of wisdom and humanity, and the interests of commerce as well as humanity require that it should be carried into effect. The putting the crew upon an allowance was, under the circumstances of the case, if not a matter of absolute necessity, at least one of prudence, and there cannot be a reasonable doubt but that it was a short allowance. According to the testimony of the cook, they were upon allowance twenty-two days, but the statement of the mate is that they were upon allowance nine days after leaving Bonavista, and the allowance was discontinued five days before their arrival in this port. As the passage was thirty-two days, that will leave eighteen. In addition to the balance of wages, I shall allow extra pay for eighteen days.

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*In the Circuit Court of the United States, for the district of Massachusetts, Boston, May Term, 1838.*

JOHN PITMAN, LIBELLANT, *v.* ROBERT HOOPER.

The true rule as to the allowance of seamen's wages, when the ship is lost in her homeward voyage, is, that the seamen should be paid the wages up to the last port of discharge, and for half the time the ship lay there. This is now the settled rule in our maritime law, and ought not to be disturbed.

The true theory of the rule seems to be this, that the seamen are entitled to be paid wages for the outward voyage, and for all the time they are employed in port in the concerns and business thereof, if freight is or might have been earned in that voyage ; and that the wages for the homeward voyage and for all the antecedent period in port, in which the seamen are employed in preparations or business connected with the homeward voyage, are to be deemed lost, by the loss of the ship on such voyage. For the sake of uniformity and certainty, and to avoid minute inquiries in each particular case, half the time passed in port has been attributed in practice to the outward voyage, and half to the homeward voyage as an equitable and just apportionment.

The cases on this subject both in England and America reviewed.

The contract for seamen's wages, though capable for some purposes of being treated as a divisible contract, is, for most purposes, treated as an entire contract.

Where an American ship in 1809 sailed from Marblehead on a voyage to St. Petersburg and back, and performed her outward voyage, and on her return voyage, was captured and carried into Denmark and condemned by the Danish tribunals, and afterwards compensation was made under treaty with Denmark, of the 28th of March 1830, for the ship and cargo : It was held, that the seamen were entitled to their full wages, during half the period of the ship's stay at St. Petersburg, and also full wages for the homeward voyage, as if it had been performed ; or full wages, up to the time when the seamen did return or might have returned home without any unnecessary delay, deducting any wages, which they might have earned in the intermediate time in another employ.

It was held, also, that as the wages for the outward voyage and during the period of the ship's stay at St. Petersburg might have been sued for, and recovered, notwithstanding the capture, upon the acknowledged principles of courts of Admiralty, not to entertain stale claims, a suit therefor after such a lapse of time was not maintainable.

STORY, J.—THIS case has been again submitted to the court upon an incidental question, which has arisen in adjusting the claim of the libellant upon the principles already decided by the court. The question is, whether the whole wages are to be calculated from half the time after the arrival of the brig at the port of St. Petersburg in Russia ; or whether a deduction is to be made therefrom of the wages from the time of the capture up to the time of the first condemnation of the brig by the Danish tribunals.<sup>1</sup> The

<sup>1</sup> Compensation had been allowed to the owners for the capture and condemnation of the ship and cargo, under the treaty with Denmark, of the 28th of March, 1830.

ground, upon which this deduction is asked by the defendant, is, that compensation for the wages from the capture to the condemnation might have been originally claimed by the libellant for his services during that period, even if no restitution under the treaty had ever been made ; and that consequently the amount ought now to be deemed by the lapse of time as a stale demand.

Before I proceed to the consideration of the question as to this deduction, I wish to say something upon another point, which is involved in the adjustment, though it has not been made at the bar. It is, from what point of time the wages ought to be calculated ; whether from half the time that the brig was at St. Petersburg ; or from the time when the outward cargo was discharged at that port. I say, that the point has not been made at the bar, and probably not made, because it has been deemed long since settled in the local jurisprudence of Massachusetts, as well as in the administration of maritime law in the courts of the United States exercising admiralty jurisdiction in this circuit. But my learned friend, judge Hopkinson, of the district court of Pennsylvania, in his elaborate opinion in *Bronde v. Haven* (Gilpin's Reports, 606, 613), has utterly denied the doctrine to be well founded, either in principle or in authority. My great deference for the opinions of that able judge has induced me on this, the first occasion, which has occurred, to review the grounds of the doctrine ; for if I now saw any error in it, so far as my own judgments are concerned, I should be well disposed at once to set about correcting it. But I am bound to declare, that upon the fullest re-examination, I am entirely satisfied, that the doctrine is well founded in principle and in authority ; that it is just and equitable, and is a natural, I had almost said a necessary, result of the enlarged policy of maritime jurisprudence, applicable to the wages of seamen. I do not propose to enter upon any elaborate exposition of the principles, on which the doctrine is established, but merely to advert to the more leading reasons for it, and the authorities, which support it. The general formulary, as laid down in lord Tenterden's treatise on shipping, (Abbott on Shipp. p. 4, ch. 2, s. 4, p. 447,) is this : " The payment of wages is generally dependent upon the payment of freight. If the ship

has earned its freight, the seamen, who have served on board the ship, have in like manner earned their wages. And, as in general, if a ship, chartered on a voyage out and home, has delivered her outward bound cargo, but perishes in the homeward voyage, the freight for the outward voyage is due; so, in the same case, the seamen are entitled to receive their wages for the time employed in the outward voyage, and the unloading of the cargo, unless by the terms of the contract the outward and homeward voyages are consolidated into one." To language so very general, certainly nothing farther than general truth can be, or ought to be, attributed. In truth, however, the language is far from being accurate; and it is not comprehensive enough to embrace the exceptions to the general rule, or even all the cases, which fall within it. Thus, it is not true in every case in the maritime law, that the payment of wages is dependent upon the payment of freight; for if freight be earned, it is wholly immaterial, whether it be paid or not. So, the earning of freight is by no means necessary in all cases to give a title to wages; as, for example, where the ship performs her voyage without the owner having furnished any cargo, or where there is a special contract between the owner and freighter, varying the right to freight from the general law; as where the freight is made dependent upon the performance both of the outward and the homeward voyage. The case of shipwreck, where materials are saved from the wreck, furnishes a still stronger illustration; for in such a case the seamen earn their wages, as far as the materials saved go, even though the freight for the homeward voyage is wholly lost.<sup>1</sup> So that a moment's reflection will teach us, that the general text of lord Tenterden does not contain a full or an accurate exposition of the whole doctrine applicable to the subject. It affords one, out of many illustrations of the maxim: *In generalibus versatur error.* If the doctrine be susceptible of any exact generalization (which perhaps it is not), it would be more correct to say, that the general rule, though not the universal rule, is, that the seamen are entitled to wages for the full period of their em-

<sup>1</sup> *The Neptune*, 1 Hagg. Adm. R. 227.

ployment in the ship's service for any particular voyage, in which freight is, or might be earned by the owner. Ordinarily, we divide voyages into the outward and the homeward voyage ; though there certainly may be, and often are, many intermediate periods and voyages ; as, for example, by vessels engaged in the freighting business. When seamen contract for a voyage from A to B and thence back to A ; the voyage from A to B is commonly called the outward voyage, and the voyage back from B to A the homeward voyage. And the maritime law in such a case, whether there be a cargo on board or not, treats these as distinct voyages, in which freight is, or may, upon its own principles, be earned. We are, therefore, accustomed to say, that the seamen are entitled to their wages for the outward voyage when ended, if freight is, or might have been earned on that voyage ; and for the homeward voyage, if freight is, or might have been earned on that voyage. But the material inquiry still remains ; when, in the sense of the maritime law, as to seamen's wages, does the voyage (either outward or homeward) commence and terminate ? It certainly does not commence on the very day of the sailing of the ship on the voyage from the port of departure and not before ; or end with the very day of her arrival at her port of destination. Neither does it necessarily, as to the seamen, commence with the loading of the cargo on board of the ship ; for the seamen may have been employed in the ship's service for a month before. Neither does it necessarily terminate with the discharge of the cargo, if the seamen are still retained in the ship's service for a month longer, for purposes connected with that particular voyage. In some voyages, even now, it is not uncommon to land the cargo of the outward voyage, and to wait, until it is sold, before any homeward voyage is, or can be undertaken ; and the homeward or ulterior voyage is in such cases mainly dependent upon the success of such sales ; sometimes conducted by the masters and officers, by what may be called a retail or barter trade. In the simplicity of the commerce in former ages, when the rule we are considering was first established, this was the common course of business. It is sometimes said, that the outward voyage is ended, when the cargo is landed,

because freight is then earned ; and that the homeward voyage commences, when the outward is thus finished. Neither of these propositions is or can be admitted to be absolutely true ; and both of them assume the very matter in controversy. It might with equal propriety of reasoning and logic be said, that the homeward voyage commences, when the cargo for the homeward voyage is taken on board ; and, of course, that the outward voyage then, and not till then, terminates. In some voyages, the sale and discharge of the outward cargo are going on simultaneously with the purchase and loading of the homeward cargo ; as, for example, in the pepper and coffee voyages to some ports and islands in the Pacific Ocean. But although the freight is ordinarily earned by the discharge of the cargo, the discharge is not necessarily to be taken as the true test or termination of the voyage. Nor is it essential to it. If the cargo arrives at the port of destination, it may still be kept on board for a great length of time, to suit the purposes of the owner or shipper ; and its discharge there may be made dependent upon future contingencies, as to the markets and prices ; or a new destination may be given to it upon some new undertaking for another voyage in the same ship. In such a case, it could not be correctly said, that the outward voyage continued after a reasonable time for the discharge of the cargo had passed. On the other hand, the cargo may be taken on shore for sale, and yet from the want of a market, it may be required to be re-shipped, and carried for sale to another port, in order to procure funds for the return cargo on the homeward voyage. Again ; it is not true, that, because the outward voyage has terminated, therefore, *eo instanti*, the homeward voyage commences. Suppose a ship to carry a cargo to New Orleans, with instructions to the master to proceed on a freighting voyage, if, within a reasonable time after the discharge of the cargo, a freight could be procured for a foreign voyage, or, if freight could not be procured, to purchase a cargo on the owner's account, if it could be purchased at a reasonable price, and to proceed therewith to a foreign port ; and, if neither could be obtained within the limits of the instructions, then to return home with a different cargo, or in ballast ; could it be cor-

rectly said in such a case, that the homeward voyage commenced immediately after the outward cargo was landed? That would be to say, that a new voyage was actually commenced, before it could be ascertained, what that voyage would be. These cases show the danger of attempting to lay down any universal rule, as applicable to all cases, as to where the outward voyage ends, and the homeward voyage begins, in respect to seamen's wages. In a just and legal sense the outward voyage may well be deemed, generally, to continue as to seamen's wages, as long as the seamen are engaged in purposes connected with the outward voyage, whether the cargo is discharged or not; and the homeward voyage to begin, when any acts are done or preparations made, having reference exclusively to the homeward voyage. And if there be any intermediate time, which is not properly referable to either, that may well be treated, like an intermediate voyage in ballast, to be for the benefit and purposes of the owner, and for which he ought therefore to pay the seamen for their services. In ordinary voyages it is not common to find any such intermediate time, or to measure it with exactness. And in many cases acts are done and proceedings had simultaneously with reference both to the outward and the homeward voyage; so that it is impracticable to divide the time with perfect accuracy which is devoted to each. Now, I apprehend, that it was with a view to this practical difficulty, that the rule has been established, that one half of the time, during which the vessel is lying in the port, shall be deemed a part of the outward voyage, and the other half a part of the homeward voyage. In this, as in many other cases, the law prefers general certainty to mere metaphysical distinctions; and a compendious, practical result, to the variable elements of every distinct voyage. The rule may seem at first view purely artificial; but it is in reality not so, but is founded upon what is ordinarily a reasonable apportionment of the time with reference to the exigencies of common voyages. It is like the allowance of the ten per cent. damages upon the protest of a foreign bill of exchange; and the deduction of one third new for old in the common cases of repairs to ships; and the deduction in cases of general average of one third

from the amount of the gross freight of the ship in estimating its contributory value. The rule is founded upon the notion, that it is a nearer approximation to absolute equity between the parties, and subserves the great public general convenience of commerce, more than any other which could be assigned ; and thus it conduces to the policy of suppressing litigation upon trifling differences. Perhaps, if a rule were now for the first time to be established, upon grounds of mere equity between the parties, without any reference to maritime policy, it ought to be, to consider the seamen absolutely entitled to their full wages in every event for the whole period, during which the ship lays in port between the discharge of the outward cargo and the taking on board of the return cargo. Such a rule, however, would somewhat impair the policy of the general maritime doctrine, which connects and binds up the interests of the seamen with the interests of the voyage ; and might seduce them into languor and indifference in the performance of their duties in port, and thus retard the operations of the voyage.

Nor is there any thing in the text of lord Tenterden, which, properly considered, interferes with this doctrine. He admits, that, " the seamen are entitled to receive their wages for the time employed in the outward voyage, and the unloading of the cargo." So, that he admits, that the wages are due so long as the seamen are employed in the outward voyage ; leaving the point, when it ends, to be decided upon the circumstances of each particular case ; for I cannot admit, that the latter words, " the unloading of the cargo," necessarily constitute a qualification of the former words, or were so intended to be understood by the author. If they were so intended, they are too loose to found any general doctrine upon them. His subsequent language, " if the ship sails to several places, wages are payable to the time of the delivery of the last cargo,"<sup>1</sup> was not designed so much to express the particular time, to which wages were due, generally, as to point out the distinction founded upon the deliveries of successive cargoes at different ports, and to state, that wages were due up to the last and not merely to

<sup>1</sup> Abbott on Shipp. p. 4, s. 2, c. 4, p. 447.

the first port of delivery. But, in truth, lord Tenterden's text is not of itself of any intrinsic authority, beyond what the authorities, on which he relies to support it, justify. Now, it is remarkable, that, if his text imports, what it has been supposed to import, that the wages are due only up to the delivery of the cargo on the outward voyage, the authorities, on which he relies, do not support it, but do in effect overturn it. It is for this reason, that I am not satisfied, that he did so construe the import of his own text. He relies on an anonymous case reported in 1 Ld. Raym. R. 639, and in 12 Mod. R. 409. I will give the report at large in each book, as it is brief. In 1 Ld. Raym. 639, (Hilary Term, 12 Will. 3,) it stands thus. "Upon a motion for a new trial in an action for seamen's wages, Holt, chief justice, said, that if the ship be lost before the first port of delivery, then the seamen lose all their wages. But if she has been at the first port of delivery, then they lose only from the last port of delivery. But if they run away, although they have been at a port of delivery; yet they lose all their wages."<sup>1</sup> In 12 Mod. R. 409, (under Trinity term, 12 Will. 3) it is as follows. "Holt, chief justice, said: If a ship go freight of an outward voyage, the seamen shall have their whole wages out. But if at their return the ship be taken, or other mischief happen, whereby the voyage homeward is lost, they shall have but half wages for the time they were in the harbor abroad." Again; in an anonymous case (probably the same case) reported in the same volume (12 Mod. R. 442, under Hilary Term, 12 Will. 3,) it is stated thus: "*Per curiam.* In respect to seamen's wages, the usage is, that if the ship be lost before the arrival in the port of delivery, they lose their wages out. If she arrive safe in port, and is lost in her homeward voyage, they have their wages out, but lose their homeward wages. If they run away after arrival

<sup>1</sup> The same point is stated in almost the same language, as used by lord Holt, in an anonymous case in Hilary Term, 13 Will. 3, in 3 Saik. R. 23. There is a dictum of lord chief justice Saunders in 2 Shower's R. 291, 34 and 35 Car. 2, in what case or on what occasion delivered, we do not know, as follows; "If a ship be lost before it comes to a delivering port, no freight nor wages is due. If lost afterwards, it is due to the last delivering port." See Callen *v.* Mico, 1 Keble's R. 831.

in port abroad, they lose their wages." In 1 *Ld. Raym.* 739, there is a report of an anonymous case, (most probably also the same case, when it was before lord Holt, at *Nisi Prius*; for it was in the same year 12 Will. 3),<sup>1</sup> which is as follows. "If a ship be bound for the East Indies, and from thence to return to England, and the ship unloads at a port in the East Indies, and takes freight to return to England, and on her return she is taken by enemies, the mariners shall have their wages for the voyage to the East Indies, and for half the time, that they stayed there to unload, and no more. Ruled by Holt, chief justice, June 4, 1700, at Guildhall at *Nisi Prius*." Now, whether (as I suppose the fact to be) these are all but different reports of the same case in its different stages at *Nisi Prius*, or in bank, or not, it is most manifest to me, that they mean to inculcate substantially the same doctrine, viz., that the wages for the homeward voyage only are lost by a loss of the ship on the return voyage; and that the homeward voyage is not calculated from the time of the discharge of the outward cargo. In the report in 1 *Ld. Raym.* 639, the wages lost are said to be "only those from the last port of delivery." In the report in 12 *Mod. R.* 442, the wages lost are said to be "the homeward wages." In the report in 12 *Mod. R.* 409, it is said, that they (the seamen) shall have their "whole wages out;" but if the voyage homeward is lost, "they shall have but half wages for the time they were in harbor abroad;" which is the same as the whole wages for half the time. In the report in *Ld. Raym.* 739, it is said, that the seamen are to "have their wages for the voyage to the East Indies, and for half the time that they stayed there to unlade, meaning, as I think, to "unlade and lade," the latter words being left out by mistake.<sup>2</sup> Taking all the reports together,

<sup>1</sup> William the third and Mary began their reign on the 13th of February, 1688; so that Hilary Term, 12 Will. 3, was in January 1701.

<sup>2</sup> In Mr. Justice Bayley's edition of lord Raymond's reports, the marginal note states the case, as I understand it; that the seamen were to be "paid for the outward voyage, and for half the time they stayed at the port of delivery." There is a dictum in *Campion v. Nicholas*, 1 *Str. R.* 405, that seamen are not paid wages "while the ship is lading and unlading;" which, if understood according to the literal import of the words, is not reconcilable with the admitted principles of law.

not only do they not justify the doctrine supposed to be laid down in Abbott on Shipping; but they directly contradict it. In my judgment, there is no irreconcilable discrepancy in these different reports, 'properly understood. They intend to assert, that the wages of the homeward voyage only are lost in the cases supposed; and that these wages are the wages from the time of the departure from the last port of delivery, and for half the time, which the ship lay in that port.

The only other citation relied on in Abbott on Shipping, in support of the text, is the Ordinance of Rotterdam; art. 214 cited in 2 Magens on Insur. 113. That article is as follows: "Further, the full wages of the ship's company shall always be deemed to be earned, whether one or more complete voyages have been made in foreign ports, even though the ship should afterwards happen to be lost." There is no pretence to say, that this article in any manner supports the doctrine, that the seamen are not entitled to wages, except up to the time of landing the cargo.

I am, therefore, (I repeat it), not satisfied, that it was lord Tenterden's intention to lay down in his text the particular doctrine already commented on; for none of the authorities cited by him sustain it. All, that he meant to state, was, that the wages of the outward voyage would be payable, if freight was earned in that voyage; and the wages of the homeward voyage lost, if the ship perished on that voyage. And in this view it leaves the point perfectly open, when the outward voyage in any given case ends, and when the homeward voyage in any given case commences.

Now, the very rule, which the cases in 1 lord Raymond's Reports, and in 12 Modern seem to promulgate, has been adopted in a great variety of cases in our American courts. I found it well established, when my own professional life began in Massachusetts; and it has been uniformly recognised and supported in that state. It is sufficient to refer to the cases of *Hooper v. Perley*, (11 Mass. R. 545); *Locke v. Swan*, (13 Mass. R. 76); *Swift v. Clarke*, (15 Mass. R. 173); and *Moore v. Jones*, (15 Mass. R. 424.) The same rule was adopted by the supreme court of Pennsylvania in *Galloway v. Morris*, (3 Yeates, 445), and by the late venerable

district judge of the district court of that state, (and his large experience in maritime contracts entitles his judgments to very great weight,) in the case of the *Cynthia*, (1 Peters's *Adm. R.* 204); *The Elizabeth*, (Peters's *C. C. R.* 130); *The Lady Walterstoff*, (1 Peters's *Adm. R.* 215); and in *Cranmer v. Gernon*, (2 Peters's *Adm. R.* 391). My learned brother, the late Mr. Justice Washington, fully supported the same rule in his able judgment in *Thompson v. Faussatt*, (Peters's *C. C. R.* 182), and it was substantially acted on by Mr. Justice Duvall in *Jones v. Smith*, (4 Hall's *Law Jour.* 276), the difference being more in terms than in judicial intention. Nor have I been able to trace a single intentional deviation from this rule, and the equities growing out of it, until judge Hopkinson, in his elaborate opinion in *Bronde v. Haven* (Gilpin's *R.* 600), shook its authority. The learned judge seems, in that opinion, to hold, that the outward voyage, with reference to seamen's wages, ends with the discharge of the outward cargo; and that the homeward voyage commences when the outward voyage ends. Now, assuming the first proposition to be true, (which is admitted only for the sake of argument), the latter is not either a natural or a necessary consequence from it; for there may be, (as we have seen), an intermediate period properly belonging to neither. The learned judge, however, admits no such intermediate period; but he deems all the time of the ship's stay in port, after the discharge of the outward cargo, (however long it may be), to be positively and necessarily a part of the homeward voyage; and, therefore, if the ship is lost on the homeward voyage, wages are due to the seamen only up to the discharge of the outward voyage. In support of these propositions he has produced no authority; or at least none, except the passage from Abbott on *Shipping* already quoted, which does not sustain them, and is not (as we have seen) a just deduction from the authorities, on which his text is founded. The learned judge has suggested, that no authorities have been cited, which support the decisions the other way in the American courts. But he seems not sufficiently to have considered, that in the cases, then in judgment, the American courts were not promulgating a new rule, but were merely recog-

nising one already well known and well established. Thus, judge Peters in *The Cynthia* (1 Peters's Adm. R. 204), speaks of the rule as the well "settled law in the court." So Mr. Justice Jackson in delivering the opinion of the court, in *Perley v. Hooper* (11 Mass. R. 547), says, "The general rule, as to the wages of seamen, which has been *for many years recognised and uniformly adopted in our courts*, is, that if the ship has carried one or more freights, and is afterwards lost, before completing the voyage, *for which* the seaman is hired, he is entitled to his wages up to the last port of delivery, and for half the time, that the ship lies in port." He neither cited nor commented on any authorities (the citations were merely those of the adverse counsel) in support of the doctrine, deeming it well known, and standing upon principles long established in our local jurisprudence.<sup>1</sup> But Mr. Justice Jackson has stated the general reasoning, on which the rule is founded, with great clearness and strength, and his own extensive knowledge of commercial jurisprudence gives a weight to that reasoning, which it will be found difficult to resist. As yet I have seen no attempt to meet, much less to overturn, that reasoning. And I entirely agree with that distinguished judge, that, "if we were at liberty, without reference to authority, to decide according to equity and good conscience, or to adopt a rule, that would be most convenient in practice, we could not, perhaps, devise one better than that heretofore established." He puts his reasoning in effect upon this; either that the outward voyage ends with the discharge of the outward cargo, and the homeward voyage begins with the lading of the homeward cargo; and that then the intermediate period does not properly constitute a part of either voyage, and for that period full wages are payable; or that half of the period of the stay of the ship in port may be properly deemed referable to the concerns of the outward voyage, and the other half to those of the homeward voyage; and then the wages should be equally apportioned.

<sup>1</sup> Judge Hopkinson has, by mistake, attributed this opinion to Mr. Chief Justice Parker. The citations of authorities, also, which he has supposed were relied on to sustain the judgment, were made not by the court but by the counsel *adverse* to the decision of the court.

tioned between them. The latter rule has been adopted in practice as the best rule; and it seems to me certainly founded in equity and general justice. My learned brother, Mr. Justice Washington, in *Thompson v. Faussatt*, (1 Peters's C. C. R. 182), fully recognised the same doctrine, and upon the same ground. He said: "My own opinion upon this new and somewhat difficult case is, that whenever the vessel is lost on her return voyage, her arrival at the last port of delivery of the outward cargo, or at the last port of destination, if there be no cargo, fixes the time, to which full wages are to be allowed, and that one half of her stay there should be added to the outward, and the other half to the homeward voyage, and to be considered respectively as parts thereof." Whether he applied his own rule correctly in that case, or not, need not be here considered. Now, it is incumbent upon those, who assert, that this is not a proper rule, to show, either that it is unjust and inconvenient in its practical operation, or that it is contradicted by some stringent and satisfactory authorities. As far as the authorities go, they are unequivocally the other way. And, for myself, I do not hesitate to say, that I should have felt myself bound by them, even if I had entertained some lurking doubts, whether they were founded in the most exact principles; for, in cases of this sort, it is far more important, that a rule should be established of general application, though somewhat arbitrary, than to be left without one. Then, as to the injustice or inconvenience of the rule, promulgated by these authorities, where has it been shown or attempted to be shown? For myself, I can only say, that I am unable to perceive any rule, which is better founded in good sense, enlightened policy, or general equity. The opposite doctrine would, on the other hand, in many cases, involve the harshest and most oppressive inflictions upon a class of men highly meritorious, and who are, by the very policy of the law, disabled from protecting themselves (as the owner may) by insurance from the loss of their hard and stinted earnings. Take the case of a voyage to St. Petersburg and back, where the ship arrives and delivers her cargo so late, that she must wait for a homeward cargo until the next season, a period of six or nine months; is it

just or equitable, that the seamen should remain by the ship for such a period, and lose all their wages without remuneration? Take the case of a detention by an embargo for a like period after the outward cargo is landed, and before the homeward voyage is undertaken, or even definitely fixed upon, are the seamen to lose their whole wages, if the ship is lost in a homeward voyage afterwards planned and commenced? The whole error seems to me to consist in a gratuitous assumption, that the homeward voyage begins, as soon as the outward cargo is landed. I am not aware, that there is any authority to that effect either in our own or in foreign jurisprudence. In cases of insurance, the commencement and termination of the outward and the homeward voyage are governed by no such considerations; but depend upon the subject matter of the insurance, and upon other collateral circumstances.<sup>1</sup>

No doctrine is to be found generally established in the maritime jurisprudence of continental Europe, independent of positive ordinances, that the seamen are to lose their wages of the homeward voyage and during their stay in port, if the ship is lost on that voyage. The text of the French ordinance of 1681, (1 Valin's Comm. lib. 3, tit. 4, art. 8, p. 703) which is substantially the language of the present French code of commerce (art. 288), contains a positive provision on the subject, which has been differently interpreted by the ablest commentators. Valin thinks<sup>2</sup> that if the ship is totally lost in the return voyage, the seamen are entitled to no wages whatsoever even for the outward voyage. Emerigon, on the contrary, thinks, that if freight is earned in the outward voyage, the seamen are entitled to their full wages up to the time of the loss of the ship, upon the ground that the wages attach as a lien upon the freight earned, *tota in toto, et tota in qualibet parte.*<sup>3</sup>

<sup>1</sup> See 3 Kent Comm. Lect. 48, p. 307 to 316, 3d edit. and the cases cited in Seamens *v.* Loring, 1 Mason's R. 140. 1 Phillips on Insur. ch. 11, s. 1, p. 161 to p. 170.

<sup>2</sup> 1 Valin's Comm. lib. 3, tit. 4, art. 8, p. 703, 704. Pothier leaves the point of interpretation untouched; Pothier on Marit. Contr. by Cushing, n. 184, p. 111.

<sup>3</sup> Emerigon, tom. 2, ch. 17, s. 11, s. 2, p. 239, 240; 2d edit. 1934 in note.

Delvincourt differs from both, and thinks, that the seamen in such a case are entitled to half their wages.<sup>1</sup> Boulay Paty deems the seamen entitled in the same case to their full wages for the outward voyage and to none for the homeward voyage.<sup>2</sup> But what I would particularly rely on, is the opinion of Pothier, who, in commenting upon this particular article of the ordinance, admits, that it is an exception to the general principles of the contract of letting to hire, according to which the seamen ought to be paid the part of the voyage elapsed, up to the time of the misfortune, and not paid for the residue of the voyage.<sup>3</sup> In general justice, then, this persuasive author shows us, that the exception has no foundation: and that it stands upon positive law as a matter of public policy. If it is to be extended beyond the homeward voyage, to embrace the stay of the ship in port from the time of the discharge of the outward cargo, it should be clear beyond any doubt, that the public policy extends to it. That has not been shown, and, as I humbly conceive, cannot be shown. If resort be had to the doctrine of apportionment in courts of equity, where contracts have been by accident prevented from being carried into entire execution and performance, it will be found that it favors the more liberal course. And it ought not to be forgotten, that in contracts for seamen's wages, courts of admiralty always follow out the benign interpretations of equity, rather than the rigid principles of the common law.

Upon a careful review of the whole doctrine on this subject, which I had occasion to examine, and act upon in the case of the *Two Catherines* (2 *Mason's R.* 329, 332,) on this point I see no reason to change the opinion then expressed. I think, that the question was at that time closed in by antecedent authorities, which ought to govern my own judgment upon such a question. But if there were no authority, then or now existing on the subject, I should still approve of the rule as settled, as one founded in

<sup>1</sup> *Delvincourt, Institut. du Droit Commercial.*

<sup>2</sup> *Boulay Paty, Droit Comm., tom. 2, tit. 5, s. 8, p. 224, 225.* See also *Santayra sur Code de Comm. art. 258, p. 169.*

<sup>3</sup> *Pothier on Marit. Cont. by Cushing, n. 184, p. 111, and note (50.) p. 151.*

solid equity, in public policy, and in commercial convenience. It will reach the justice of most cases with as much certainty as is ordinarily attainable in human affairs. The true theory of the rule is, that the seamen ought to be paid wages for the outward voyage, and for all the time they are employed in port in the concerns thereof, and if freight is or might have been earned by the owner in that voyage; that the wages for the homeward voyage, and for all the antecedent period in port in which the seamen are employed in preparations or business connected therewith, are lost by a total loss of the ship and freight on the homeward voyage; that, for the sake of uniformity and certainty, half the time passed in port is attributed to each voyage, and is an apportionment commended by the double motive of suppressing litigation upon slight distinctions, and of accomplishing the ends of maritime policy, by which the right to wages is made in a good degree dependent upon the safety and success of the voyage.

The other question, which, indeed, is the only one propounded for the consideration of the court, does not seem to me to involve any intrinsic difficulty. The contract for mariners' wages, though in itself capable of division for some purposes, as, for example, in regard to the outward and the homeward voyage, is, for most purposes, treated as an entire contract. Although a seaman may, in many cases, be entitled to claim his wages for the outward voyage upon the due performance thereof, yet, inasmuch as the claim arises under an entire contract for the round voyage, the mere fact of the earning of such wages on the outward voyage does not amount to a positive severance of the contract, *pro tanto*. The most that can be properly said is, that it may give an election to the seamen to sue; and, upon his election and suit, there will be an actual severance of the contract; but not before. For many purposes, indeed, the contract must be treated as an entire one, subsisting for the round voyage; for, if, upon the homeward voyage, the seaman should grossly misconduct himself, that might involve the forfeiture of all his wages antecedently earned. That was the very case of the *Mentor*, (4 *Mason's R.* 84.) It seems to me, therefore, that where wages are earned under an entire con-

tract for the outward voyage, and yet the right thereto may be affected by subsequent events, and has not become absolute to all intents and purposes, the contract is not to be deemed *ipso facto* severed, but as subsisting as an entirety for the round voyage. Such at least is the opinion to which my present reflections have led me, though certainly I do not wish to be bound by it, if upon further argument and reflection I should see reason to change it. In this view of the matter, in the events which did occur, the wages, which became due on the outward voyage to St. Petersburg, were, by the capture and condemnation, vested by an absolute title in the libellant in 1809. They might then have been sued for, and consequently by lapse of time, upon the acknowledged principles of courts of admiralty, even if they have not been paid, they are to be treated as a stale claim, incapable of being asserted here. Indeed, in the present suit, which may be deemed in some sort in the nature of a proceeding *in rem* against the proceeds of the captured property in the hands of the owner under the award of the commissioners, there is no ground to say, that any indemnity has been received for such wages, or for the freight earned on the outward voyage; or that any trust, or equitable lien therefore, attaches to the fund. So far, then, as the claim for the wages of the outward voyage are concerned, if they were in controversy, there is as little ground to say, that the claim is or could be revived by the award. In point of fact, I understand, that it is not controverted, that they were paid by the owner.

Very different considerations, however, do in my judgment, arise in respect to the claim for the wages for the homeward voyage, including half the time of the stay at St. Petersburg. The capture of a neutral ship does not dissolve the contract for the seamen's wages, but merely suspends it; and it is not dissolved until the final condemnation. Up to that period, the seamen have a right to remain by the ship, and await the event, as an incident to their contract. So it was held by this court in the case of the Saratoga (2 Gallison's R. 164, 176, 177). If nothing more occurs, and the ship is condemned, the seamen lose their whole wages for

the homeward voyage, unless, indeed, there is an ultimate decree of restitution, or an award of indemnity by treaty on account of the illegality of the capture, as in the present case ; in which event, the right to their wages revives as a trust, lien, or privilege attached thereto. The seamen cannot claim any compensation for their services between the time of the capture and condemnation, unless there is a new and distinct retainer or contract of the master with them, to pay them a compensation for such services in every event. Such a contract is not to be presumed ; but might be distinctly propounded and proved. Now, in the present case, it is neither propounded in the answer, nor is it proved in the case ; and as a matter of defence, the *onus probandi* is on the respondent. If such a contract had been proved, and payment under it had been also established, I should have thought, that a deduction *pro tanto* ought to have been made from the present claim. If the contract had been made, but no payment under it had been made, I should have thought, that it could not have been propounded as an extinguishment of the claim to wages *pro tanto*, since, at most, it would be but an accord without a satisfaction. Indeed, in an equitable view, it would be manifestly unjust, to allow the owner to deduct a sum under another contract, which he had never paid in extinguishment of a legal claim under the shipping articles, and the award of the commissioners.

My judgment, therefore, is, that the libellant is entitled to full wages during the whole of the homeward voyage, in the same manner as if it had been performed, including half the time of the ship's stay at St. Petersburg, without any deduction ; which is the substance, I believe, of the decree of the district court.

*J. Pickering, and J. H. Prince, for the libellant.*

*C. P. and B. R. Curtis, for the respondent.*

Afterwards, it was suggested by the counsel for the respondent, that, as the homeward voyage had not been performed, the time up to which the wages were to be allowed was uncertain ; and that the district judge had allowed three months' wages from the time of the condemnation, as a reasonable time for the return of the seamen home, by analogy to the act of congress, allowing

three months wages in cases of the discharge of seamen in foreign ports. There were other cases depending, in which the same point might arise, and, therefore, it was desirable to have it settled.

STORY, J.—The rule in cases of this sort ought to be, to give wages up to the time when the seamen did return, or might have returned home, without any voluntary and unnecessary delay on their part, deducting any wages they may in the intermediate time have earned in another employ. I should think that in the absence of all other proofs, the rule of the district judge was a very equitable one, as applicable to European voyages; although it might not be equally applicable to East India voyages. No objection being made to this allowance in the present case, it will of course stand.

Decree affirmed.

[For the foregoing case of *Pitman v. Hooper*, we are indebted to the Law Reporter, for December, 1838.]

## LEGISLATION.

**UNITED STATES.** The twenty-fifth congress of the United States, at the second session thereof, which commenced in December 1837, and terminated in July 1838, passed two hundred and sixty-four acts and seven joint resolutions.

*Iowa territory.* The territory of Wisconsin is divided, and that part lying west of the Mississippi river, and of a line drawn due north from the head waters of that river to the territorial line, is erected into a territory, for the purposes of temporary government, by the name of Iowa. Chap. 96.

*Steam-engine boilers.* The president is authorized to appoint three persons, to examine and test any inventions that may be offered to their consideration, designed for detecting the cause and preventing the explosion of the boilers of steam engines. Chap. 147.

*Laws of Florida.* The sum of two thousand dollars is appropriated, and placed under the control of the governor of Florida, to be expended in compiling the statutes and other laws of that territory. Chap. 179.

*Security of steamboats.* An act for the better security of the lives of passengers on board steam vessels, makes it the duty of the owners of such vessels, on or before the first day of October 1838, to make a new enrolment, and to take out from the collector or surveyor of the port, where any such vessel is enrolled, a new license, under the conditions previously required by law, and those embraced in the act. After the above date, it will be unlawful to transport either goods, merchandise, or passengers, on board a boat propelled in whole or in part by steam, in any of the bays, rivers, lakes, or other navigable waters of the United States, with-

out having obtained the license above specified, and complied with the conditions of this act, under penalty of \$500 for every violation, for which sums the vessel is made liable, and may be proceeded against summarily by libel, in the district court.

It is made the duty of the district judge, in any district where there are ports of entry or delivery, on the application of the master or owner of any steam vessel, to appoint from time to time one or more persons, not interested in the manufacture of steam engines, boilers, or other machinery of steam vessels, who are skilled and competent to make inspections of such vessels, and of the boilers and machinery employed in the same; whose duty it shall be, after having taken an oath for the faithful performance of said duty, to make such inspection, when called upon for the purpose, and to give the owner or master duplicate certificates of the inspection.

The certificate of the person or persons, who shall be called on to inspect the hull of any such vessel, must, after a thorough examination, state the age of the vessel, the time and place where built, and the length of time she has been running, with the opinion of the examiner whether she is sound, and in all respects seaworthy, and fit to be used for the transportation of freight or passengers. For this service, the inspectors are to be each allowed and paid, by the master or owner, the sum of five dollars. The person or persons who shall be called on to inspect the boilers and machinery of any steam vessel, under this act, are required, after a thorough examination, to state in their certificate their opinion whether the boilers are sound and fit for use, together with the age of the boilers. Nothing is specifically required to be certified of other parts of the machinery. Duplicate certificates are to be given, one of which is to be delivered by the master or owner to the collector or surveyor, on the granting or renewal of the license, and the other is to be kept posted up in some conspicuous part of the vessel, for the information of the public. A fee of five dollars is to be paid to each of the inspectors.

It is made the duty of the master or owner of every steamboat, to cause an inspection of the vessel to be made once in every twelve months, at least, and of the machinery, once in every six

months, and to deliver the certificate of the latter to the collector or surveyor, on pain of forfeiting the license, and being subject to the penalties above mentioned. The owners and masters are required to employ a competent number of experienced and skilful engineers, and in case of neglect so to do, will be held responsible for all damages to the property or any passenger on board, which may be occasioned by an explosion of the boiler or derangement of the machinery.

Whenever any steam vessel is stopped, for taking in or discharging passengers or cargo, or for any other purpose, it is required that the safety valve shall be opened for the discharge of steam, so that it may be kept down as near as is practicable, to what it is when the boat is under headway, under penalty of \$200 for every offence. Steamboats on the lakes not exceeding two hundred tons are required to have two long boats or yawls, each competent to carry twenty persons at least; and larger vessels, at least three long boats of equal or greater dimensions, under penalty of \$300 for every failure.

Steamboats, both on the lakes and on the sea, are required to be provided with a fire engine, with hose and suction hose, capable of being worked on every voyage; also to have iron rods or chains, instead of wheel or till ropes, under penalty of \$300 for each failure. Boats running between sun set and sun rise are required to have one or more signal lights, under penalty of \$200. All penalties may be sued for and recovered in the district or circuit courts, in the name of the United States, one half to the use of the informer, or it may be prosecuted for by indictment.

Every captain, engineer, pilot, or other person employed on board such boat, by whose misconduct, negligence or inattention to his duties, the life of any person is destroyed, shall be deemed guilty of manslaughter, and on conviction thereof, before the circuit court, shall be sentenced to confinement at hard labor for a period not exceeding ten years. In all suits against proprietors for injuries arising to person or property from the bursting of the boiler, the collapse of the flue, or other injurious escape of steam, the fact of such bursting, collapse, or injurious escape of steam,

shall be taken as full *prima facie* evidence to charge the defendant or those in his employment, with negligence, until he shall show that no negligence has been committed by him or them. Chap. 191.

*Debates in the convention, which formed the constitution of the United States.* The committee on the library is authorized to cause the Madison papers (being the manuscript debates of the convention which formed the constitution, written down at the time by the late Mr. Madison) to be printed and published ; and the sum of five thousand dollars is appropriated for the purpose. Chap. 264.

## CRITICAL NOTICES.

1.—*An Abridgment of the Law of Nisi Prius.* By P. BRADY LEIGH, Esq. of the Inner Temple, Barrister at Law, with notes and references to the latest American cases, by GEORGE SHARSWOOD. In two volumes. Philadelphia : P. H. Nicklin and T. Johnson, 1838.

THE following extract from the preface of the author explains his objects and purposes in the compilation of the present work.

“ The production of a new treatise on the law of *Nisi Prius*, while a book of established reputation on the same subject is before the public, may be thought to require some apology. It was, however, conceived, that a work, treating of this branch of the law with more minute accuracy than any existing publication, was called for by the profession. With a view to supply a want felt by the practitioner, the author has endeavored to introduce into this compilation every point and case of practical importance relating to the subjects which it embraces. The modern changes in the laws and practice have been particularly attended to ; the new rules, the recent statutes, and all the decisions under them applicable to *Nisi Prius*, down to the period of publication, will be found under appropriate heads.

Although this work is principally designed for members of the profession engaged in actual practice, no pains have been spared to make it also useful to the student. Under each head, the author has endeavored to lay down the principles of the law as collected from the authorities ; the grounds of the decisions are generally given in the language of the court, as being more satisfactory than any rule which he felt he could extract from them ; the leading cases are set forth at considerable length—those parts only of the reports being omitted which could not assist in illustrating the principles upon which the decisions are founded ; and the rules of pleading and evidence applicable to the different actions are carefully incorporated.”

The following is the list of heads or subjects into which the work is divided. In the first volume, Assumpsit, Attorney, Bankruptcy, Bills of Exchange, Carriers, Case, Covenants ; in the second, Debt, Detinue, Distress, Ejectment, Executors and Administrators, Frauds, Statutes against, Fraudulent Misrepresentation, Husband and Wife, Insurance, Limitations, Statutes of, Malicious Prosecution, Practice in trials at Nisi Prius, Replevin, Slander, Trespass, Trover, Warranty, Wills. This extensive course of subjects the author appears to have gone over carefully and elaborately, and the result of his labors is a work valuable alike to the student and the practitioner. It comprises all the latest English cases, which have been decided since the publication of Mr. Selwyn's well-known treatise. The American editor has confined himself in his notes to such cases as have been decided since the last edition of Wheaton's Selywn by Mr. Wharton.

*2.—A full and arranged Digest of Cases decided in the Supreme, Circuit, and District Courts of the United States, from the organization of the government of the United States.* By RICHARD PETERS, Counsellor at Law and Reporter of the decisions of the Supreme Court of the United States. In three volumes. Vol. I. Philadelphia : Thomas, Cowperthwaite & Co. 1838.

THE multiplication of law books and especially of reports, which has been so observable for some years past, creates a perpetual necessity for the arranging and condensing process of the digestor, as few have either the money to buy or the time to read the original volumes themselves. The present work will, we have no doubt, be cordially welcomed by that portion of the profession (by no means a small one) which have not the means of gaining access to the already ample library from which its materials are drawn. The decisions of the several courts of the United States have, of course, an authority as ample as the bounds of the country, and no practising lawyer, whether his habitation be by the waves of the Atlantic or the rivers of the far west, can safely be ignorant of them ; and within the compass of three octavo vol-

umes he will have the condensed essence of Dallas, Cranch, Wheaton, Peters, Gallison, Mason, Sumner, Baldwin, Gilpin, Paine, Washington, &c. The present volume, of about seven hundred pages, contains the cases coming within the first three letters of the alphabet, beginning with "Abandonment" and ending with "Custom." Its execution does credit to the industry of the author, and its arrangement is good. Here and there we meet with a paragraph which might be condensed into a smaller compass, but we believe that nothing of any importance has been omitted. Prefixed are the rules of the supreme court. The work is very properly dedicated to Mr. Chief Justice Taney. The paper and print are very good.

3.—*A Charge to the Grand Jury of Merrimack County, N. H., delivered at the September Term of the Court of Common Pleas, 1838.* By the HON. JOEL PARKER, Chief Justice of the State of New Hampshire; published in the New Hampshire Patriot and State Gazette, of October 15, 22, and 29, 1838.

In this charge, chief justice Parker, after alluding to the general duty of grand juries, and to the modern practice of calling their attention to subjects having a general reference to the "administration of justice, and the welfare and happiness of the community," proceeds to consider the subject of insanity. The following remarks present an interesting account of the statistics of insanity in New Hampshire, and are besides worthy of all attention, for the justness of their views in reference to insanity as a subject of legal control, and of judicial investigation.

"It is one which has a most intimate connexion with the administration of jurisprudence in all its departments, whether of common law or equity; one which is constantly presented not only in the civil, but in the criminal jurisdiction; and in all our tribunals, from the magistrate of the most limited authority, to the court of final resort, it is constantly recurring for consideration. The authorities of our towns are, from time to time, called on to provide for the support of individuals, who but for aberration of mind would be fully competent to provide for their own wants. The courts of probate possess, and not unfrequently are called

upon to exercise, the power of appointing guardians to persons *non compotes mentis*. And not the least difficult among the labors of that court, and of this on the issue formed upon appeal, are those occasioned by controversies respecting wills, where it is alleged that the testator was of non-sane memory. The courts of common law are from time to time required to determine respecting contracts, which are alleged to be invalid from want of capacity to contract; and above all to pass upon the guilt or innocence of citizens, who are defended against an accusation for a capital crime on the ground of insanity.

"It is surely not astonishing, that in one way or another it so often becomes the subject of examination before the judicial tribunals.

"By returns from eighty-three towns made by order of the legislature in 1832, there were within those towns *one hundred and ninety-three* cases of insanity, and from one hundred and twenty-seven towns no report was received. At a similar ratio for all the towns in the state, the number would be about *five hundred*. Of those returned, *ninety-eight* were paupers, and *ninety-five* not so. From the returns, about half were or had been in confinement, and probably omissions in that respect gave a less number who had been restrained in this way, than the facts would have warranted. Some were in cages and cells—some in irons and chains—and some in jails.

"The report of a committee in 1836 shows returns from one hundred and sixty-one towns, in one hundred and forty-one of which the whole number of insane persons was *three hundred and twelve*. In twenty of the towns from which returns were received, there were no insane. The period in which the insanity had existed, as far as reported, was from two weeks to *sixty years*, and gave an average of about thirteen and a half years duration. Taking the ratio of the population of the towns from which the returns were received, as compared with the population of the state, and the whole number of the insane would be nearly *four hundred and fifty*. There are obvious reasons why this should be below the actual number.

"By inquiries recently made it appears that the number of the insane in the county of Cheshire is *fifty*—nearly two for every one thousand inhabitants; which would give about *five hundred* for the whole state.

"It may then safely be assumed that there cannot be much less than that number.

"Of the actual condition of this number of people it is of course impossible to speak with precise accuracy; with some there is no doubt that the malady exhibits itself in an inoffensive manner, and in such a way

as to require but a moderate degree of care and attention on the part of their friends. But in relation to others, although but a portion of the truth has been disclosed, the confinement of nearly half, according to the returns of 1832—the resort to chains, and cages, and jails, tells a frightful tale of misery and woe endured, not only by the individuals thus deprived of reason, but by relations, and friends, and neighbors, to whom, in the providence of God, their custody and care have been committed.

“ We do not need the particular details. We have only to recur to our own knowledge of the effects of insanity, to bring before us the sullen mood—the meditated revenge for fancied injuries—the wild halloo—the attack—the struggle—in some instances, alas ! the fatal struggle, with near kindred—with a wife, a father, or a son.

“ And on the other hand, the reported returns made to the legislature, ‘ confined ’—‘ sometimes confined ’—‘ confined in the poor house ’—‘ confined in a cage ’—‘ chained ’—‘ confined in jail,’ assure us beyond the possibility of question, that hardship, and suffering, and misery, such as fall not commonly to the lot of mortals, have been endured by those who have (in many instances without doubt in the existing state of things necessarily) been subjected to restraints of such a character.

“ Whether we regard the suffering of the insane, and the burdens imposed upon relations and friends, and upon the public charity ; or whether we consider it with reference to its connection with our jurisprudence, it is of the highest importance that insanity should be more fully understood, and that suitable measures should be taken for the relief and security of the insane themselves, of their friends and connections, and of the community at large.

“ Notwithstanding all that has been said and written within a few years past, in relation to this most interesting subject, it is apparent that correct information respecting it is diffused in but a very limited degree among the people of this country.

“ The public papers, in giving reports of trials, often say ‘ the defence was, as usual, insanity,’ or make use of some other expression, indicating a belief that this species of defence is resorted to in desperate cases, for the purpose of aiding in the escape of criminals from justice. Such opinions are propagated in many instances by those whose feelings are too much enlisted, or whose ignorance respecting the subject is too great, to permit them to form a dispassionate and intelligent judgment ; and they have a very pernicious tendency, inasmuch as they excite prejudices in the public mind, and the unfortunate individual, who is really

entitled to the benefit of such a defence, is thereby sometimes deprived of a fair and impartial trial. They tend to make the defence of insanity odious, to create an impression against its truth in the outset, and thus to bias the minds of the jury against the prisoner, and to induce them to give little heed to the evidence, in the very cases where the greatest care, and attention, and impartiality, are necessary for the development of truth, and the attainment of justice.

" We all concur in the doctrine of the law, that for acts committed during a period of insanity, and induced by it, the party is not responsible ; that where the criminal mind is wanting, when, instead of being guided by the reason which God bestowed, the individual is excited and led on by insane fury and impulse, or by the aberrations of a wandering intellect, or a morbid and diseased imagination, or a false and distorted vision and perception of things, punishment should not follow the act as for an offence committed ; that when the faculty of distinguishing between right and wrong is wanting, the individual ought not to be held as a moral and accountable agent. As well, nay, much better, might we, as was formerly done in France, institute prosecutions against the brute creation for offences committed by them, and hang a beast for homicide, than to prosecute and condemn a human being who is deprived of his reason ; for in such case there is no hope of a restoration to a right mind, and a reinstating of a fellow citizen, who has been once lost to the community, in the rights and affections of humanity.

" But if we imbibe the idea that instances of insanity are very rare—that derangement exists only when it manifests itself by incoherent language and unrestrained fury—that the defence, when it is offered, is probably the last resort of an untiring advocate, who, convinced that no real defence can avail, will not hesitate to palm off a pretended derangement to procure the escape of his client from a merited punishment—if in this way we steel our hearts against all sympathy, and our minds against all conviction, it is of little avail that we agree to the abstract proposition, that insanity does in fact furnish a sufficient defence against an accusation for a crime.

" There are undoubtedly instances, in which this kind of defence is attempted from the mere conviction that nothing else can avail—cases in which the advocate forgets the high duty to which he is called, and excites a prejudice against the case of others, by attempting to procure the escape of a criminal under this false pretence, but such cases are truly rare, and usually unsuccessful. The reason, which the creator has bestowed upon mankind for their guidance, is strong within them, and

breaks through the flimsy veil under which a counterfeit madness attempts to conceal it.

" But if there were difficulties here, they would only add an additional proof of the necessity of a more thorough knowledge upon the subject of insanity itself, in order the more certainly to ensure the detection of impostors."

Having made these general remarks, the judge proceeds to describe some of those forms of insanity, which are " most likely to become the subject of examination in the courts of justice ; " and, in doing this, he avails himself of the recently published work of Dr. Ray, on the medical jurisprudence of insanity, the general doctrines of which he adopts and sanctions. Our opinion of Dr. Ray's work, which we reviewed in our last July number, is already well known to our readers ; and it affords us the highest gratification, to find that opinion strengthened and confirmed by the high authority of chief justice Parker. An expression of the private individual opinion of a man of learning and science, in favor of the new doctrine of insanity, we should regard as a most happy circumstance ; but, in this charge of the highest judicial officer of New Hampshire, there are other and stronger grounds, upon which the friends of humanity and science have reason to congratulate themselves. We regard it as an official declaration, that the theory of insanity, which it recognises, is hereafter to be applied in the regulation of the insane, and in considering and judging of their rights and responsibilities, in the state of New Hampshire. In this point of view, it is fully equivalent to a legislative act. We earnestly hope, that other judges, laying aside all prejudice, and all preconceived theories, will be excited by the example of the chief justice of New Hampshire, to bestow upon this most important matter that consideration which it deserves, and, like him, will have the independence and firmness to make known their opinions. Within the last half century, a vast improvement has taken place in the curative treatment of insanity, and in the care and attention bestowed upon the insane ; but the triumph of humanity will not be complete, until the laws, relating to this unfortunate class, shall be administered with a similar regard to the claims of science.

4.—*Civil Code of the State of Louisiana; with Annotations by WHEELOCK S. UPTON, L. L. B. and NEEDLER R. JENNINGS. New Orleans: E. Johns & Co. Stationers' Hall, 1838.*

In the October number of our journal for 1837, under the head of a notice of the most recent revisions and digests of the statute laws of the several states, we gave an account of the different legislative promulgations of the state of Louisiana, to which we refer our readers for a history of the compilation of this code, as well as for a summary of the matters embraced in it.

The present edition contains, besides the code itself, the preface of the editors, the act authorizing the governor to purchase one thousand copies of the work for the use of the state, the treaty of cession, the submission of the territory of Orleans to the government of the United States, the constitution of the United States, with the amendments thereto, and the constitution of the state of Louisiana. The new edition is dedicated to the Hon. Francis Xavier Martin, the senior judge of the supreme court of Louisiana.

This edition seems to have been prepared with much care and labor, by the gentlemen employed as editors; who, we are informed, in the preface, besides drawing upon their own resources, were aided in their arduous task, by the "results of the professional experience" of some of "the most distinguished judicial characters" of the state. The labors of the editors consist almost entirely of references, under each article, to analogous sources contained in books of reports and elementary works of authority.

Our readers will recollect, that the civil code and the code of practice are the only codes, which have yet been enacted in Louisiana. The commissioners, by whom they were prepared, were also empowered to compile a commercial code; but, this, so far as we are informed, has never been executed. The criminal code, prepared by Mr. Livingston, has not been as yet, and probably will not be adopted. We are exceedingly glad, that this new edition has been published. The first had become exceedingly rare and difficult to be obtained; while the increasing relations of the state of Louisiana with the other states of the union had made

a knowledge of her system of laws indispensable to others, besides her own citizens. We may add, too, that the interest, which is now felt in the subject of codification, has created a strong desire in many to examine the only general code, which has been compiled and enacted, on this side of the Atlantic. We cannot doubt, that the friends of codification will be strengthened, and its opponents conciliated, by a diffusion and general knowledge of the civil code of Louisiana.

The copy before us is printed in French and English. We understand that the work is also printed separately in French and in English. The publishers announce, that the code of practice is in preparation, on the same plan, by Mr. Upton, one of the editors of the civil code, and will be published on or before the month of January, 1839.

5.—*A Treatise on Criminal Law, with an Exposition of the office and authority of Justices of the Peace in Virginia, including forms of practice.* By J. A. G. DAVIS, Professor of Law in the University of Virginia. Philadelphia: C. Sherman & Co. 1838.

The nature of the above work is made known by its title. The author's object has been to prepare a manual, which shall give such information on the various subjects of criminal law, to justices of the peace in Virginia, as shall enable them to discharge with safety and efficiency the important duties entrusted to them in that state, in the administration of the criminal law. The nature of crimes and punishments, and the various branches of criminal law, are treated of in a practical but by no means superficial manner; and the work, we think, will be of great value as a manual of reference within the limits of Virginia, and may also be advantageously consulted by magistrates in other states. A second part treats of the office and jurisdiction of justices of the peace in civil matters. We hope that the reception of this valuable treatise, on a subject peculiar to his own state, will encourage the learned professor to devote his labors to some topic of more general interest and application.

6.—*On the Development of the Public Law of Germany, according to the Constitution of the Germanic Confederation ;* (in German), by P. A. PFIZER. Stuttgart, Liesching, 1835.

[From the *Revue Etrangère et Française*, for November, 1835.]

The author observes, in his preface, that, notwithstanding the great number of good writings on the public law of the Germanic confederation, the constitution of this confederation is little known, even in Germany itself ; he proposes to treat the subject in a manner less scientific and more practical than any of his predecessors ; and he expresses the opinion, that Germany cannot expect any thing from the confederation, in favor of constitutional interests. This opinion predominates throughout the whole course of the work. The following is a summary of the sections of which it is composed :

I. Sketch of the political history of Germany. II. Formation of the Germanic confederation. III. Progress of this confederation to the decrees of Carlsbad. IV. Actual constitution, according to its organic and fundamental laws : § 1. Character of the confederation ; § 2, Objects submitted to the feudal power and the extent of this power ; § 3, Organic institutions. V. Developments given to the confederation. VI. Actual state of things. VII. Policy of governments and policy of nations. These two last sections are particularly devoted to the development of the opinion, which the author advances in his preface. We shall not pretend to pronounce between Mr. Pfizer and his political adversaries ; but these latter cannot refuse to do him the justice, that, while he severely criticises the measures which they have taken, he keeps within the limits, which a conscientious author ought to impose upon himself. The authorities of Wurtemberg have accordingly removed the injunction which was laid upon this work, at the time of its publication. We shall conclude this notice by a translation of one of the last paragraphs of the seventh section.

“ The policy of conservation and reaction, which the cabinets are now pursuing, operates to the disadvantage of their own interests. In fact, what is it, that assures the duration of the German thrones ? Is it the

right of princes? But this right, if it really exist, is subordinated to the fulfilment of duties, which are every day becoming more difficult to reconcile with the monarchical principle, which the confederation professes and proclaims. Is it their power? This is great in regard to the nation; but the progress of civilization and the development of public life are concurring every day to diminish it. Is it in the union of the princes against the nations? It places them, from day to day, further under the dependence of the most powerful among themselves, and it will necessarily undermine their political independence. Is it in the fidelity of their subjects? This fidelity, when it is not based upon reciprocal interests, or upon the sentiments of popular gratitude, rests upon a belief, which time will necessarily destroy. Then, the thirty-eight sovereigns will no longer be able to satisfy their people, in any other manner, than by a conscientious fulfilment of the engagements, which they have taken upon themselves, and by a spontaneous concession of that, which it is impossible for them to continue for ever to refuse."

The *Revue du Nord*, for October 1835, contains an extended analysis of this work, by Mr. Spazier.

7.—*De l'Etude du Droit Romain en France, depuis 1830.* [On the Study of the Roman Law in France since 1830.] par M. WARNKÖNIG.

[From the *Rev. Etr. et Fr.*, for March, 1837.]

This tract forms a part of an article in the *Journal du Droit civil et criminel*, published by Messrs. Rosshirt & Warnkönig, and is addressed by the author to the different reviews of jurisprudence in Paris. It is the continuation of divers articles on the study of the Roman law in France, published by Mr. Warnkönig in the Critical Journal; he observes, that, since the year 1831, the law faculty of Paris has not had any doctrine of its own, properly speaking, and that the spirit of individualism has destroyed the unitary tendency, which manifested itself during the short interval from 1820 to 1826. Mr. Lerminier, elevated to a professorship in the college of France, gives an entirely political direction to his studies, and occupies himself much less with the real progress of the science, than with a certain popularization of its results. The author criticises, with some severity, the works of Messrs. Ruffat, Ducaurroy, and Ortolan, and renders justice to

the work of Mr. Giraud. In conclusion, Mr. Warnkönig makes mention of the discussion, which took place between Messrs. Ducaurroy and Dupin, in relation to the work of Mr. Ortolan ; and also of the little support, given in France, to a subscription opened for the publication of a translation of the work of Mackeldy.

[The work here alluded to is the *Lehrbuch des heutigen Römischem recht*, or Compendium of the Roman Law in actual use, a very celebrated treatise, the eleventh edition of which has been recently published at Giessen.]

8.—*Mémoire à M. le ministre de l' instruction publique et à M. les membres composant le conseil royal, sur la question de savoir si l'on doit écrire et parler en Latin, dans les concours ouverts devant les facultés de droit ?* [Memoir on the question of speaking and writing in Latin, in the concurrences opened before the law faculties.] par M. BRAVARD, professeur à la faculté de Paris.

[From the *Revue Etrangère et Françoise*, for March, 1837.]

The author declares himself for the negative, and demands a decision of the question, agreeably to his opinion. He supports himself upon the fact, that the greater number of French juris-consults, though they very well understand the Latin of the law, yet speak it badly or with difficulty, the consequence of which is, that many capable men are kept from the concurrence, by the obligation to speak Latin ; that the *ennui* and disgust, inseparable from a Latin discussion, have a powerful influence, in deterring young men from the sessions of the concurrence ; and, finally, that the forced composition of the theses on the Roman law in Latin is the cause, that they are generally nothing more than mere compilations of texts and of passages extracted from divers authors. Mr. Bravard concludes, by pointing out the difficulty, both to the judges and the disputants, of following and apprehending the arguments alleged on the one side and on the other ; which inconveniences, he thinks, would entirely disappear, if the French language were substituted for the Latin. Though we are entirely convinced, that whoever devotes himself to the profound study of the law of a nation, must begin by thoroughly mastering

the language of the sources of that law, we share the opinion of Mr. Bravard, considering *the actual state* of education in France, and we think, with him, that, by removing the necessity of writing and speaking in Latin, in the concurrence, on matters of Roman law, the discussions would be relieved from the obscurity and ridicule, which too frequently attend them.

9.—*On the Relation which exists between the Public Law of the German Confederacy and that of the Confederate States* (in German); by the baron DE GRUBEN, chamberlain of the king of Bavaria. Stuttgart, Balz, 1835.

[From the *Rev. Et. & Fr.*, for November, 1835.]

The author advances an opinion, diametrically opposed to that of Mr. Pfizer, and, according to him, the expectations, which the Germanic confederation has given birth to, have been realized and even surpassed. The confederation, proceeding, according to its fundamental character of *a union of sovereign princes*, and at the same time adopting the form of a confederation of states (*staatenbund*), has acted with as much vigor and intensity, as could have been displayed by a confederated state (*bundesstaat*). The author necessarily arrives at the result, that the public law of each of the confederated states is subordinated to the public law of the confederation, and that those provisions of the federal act, which establish some rights in favor of the nation, are to be regarded as simple concessions.

10.—*On the present state of the controversy concerning the lawfulness of capital punishment* (in German); by Mr. Hepp, professor at Tübingen. Tübingen, Ossiander.

[From the *Rev. Et. & Fr.*, for January, 1836.]

This book presents an analysis of the principal works on the question of the punishment of death, which have appeared in England, France, Belgium, Italy, the United States, and in Germany. In combatting the application of this punishment, the author brings together and arranges systematically the different arguments which support his opinion.

## INTELLIGENCE AND MISCELLANY.

*Imperial Law School of Saint Petersburg.* The following account of this institution is translated from a notice, by Mr. Stöckhardt, one of the professors, published in the *Rev. Etr. & Fr.* for October, 1837.

The imperial law school of Saint Petersburg, was established in the year 1835, by an organic statute (*ustaph*) officially promulgated. The first idea of this institution is due to the prince d'Oldenburg, the head of the department of justice in the council of the empire, and a senator and lieutenant general of the army. The prince has devoted to this object one million of roubles. The organic statute appoints the founder the curator of the new school, which is of so high importance for Russia ; and, this choice, which satisfies all the conditions, requisite to accomplish the object of an establishment, destined to exert a powerful influence over the destinies of a vast empire, is at the same time a pledge of its prosperity and an element of success. The purpose of the institution of the imperial law school is, to form, for the whole extent of the empire, jurisconsults and especially magistrates, versed in the knowledge of law and formed to the practice of jurisprudence. Hitherto, the Russian jurisconsults, with some rare exceptions, have been formed by practice alone ; and, in regard to their knowledge, limited almost exclusively to the forms of jurisprudence, they might be compared with the *Pragmatikoi* of ancient Greece. The law school is destined to fill the ranks of the magistracy and of the jurisconsults with men penetrated by the spirit, the science, and the sanctity of their mission. It is this consideration of practical interest, which has caused the school of law to be placed

within the attributions of the ministry of justice. The studies of the pupils, however, are in a more special manner, to be directed to a knowledge of the functions of the senate, which is the most eminent and most important judiciary body of the empire. This consideration, added to that of the division of casts recognised by the constitution of the empire, explains the disposition of the statute, which declares those young men only to be admissible to the school of law, who belong to the Russian nobility.

The following is a succinct account in detail of the internal organization of this scientific establishment.

The pupils are either supported at the expense of the government (*boursiers de la couronne*), or at their own expense (*pensionnaires*) ; and both classes are lodged in the school, in order that their education and their conduct, as well as their instruction, may be subjected to the proper superintendence and direction. The school is a true judicial seminary ; but no other establishment in the universe can be compared with it, in point of magnificence and sumptuousness. The school has its church, its ministers of religion, its physicians, its police, its regents for each class, its chancery ; in one word, all the *personnel* necessary to a complete administration. All the persons employed in the institution are under the orders of the director, who is a counsellor of state in ordinary service, Mr. de Poschmann ; the special direction of the scientific department is confided to an inspector, the baron de Wrangell, who is also a counsellor of state.

The pupils of the school of law are to receive all the principles of their intellectual and moral instruction, as much as possible, within the school ; for the principal object of the establishment is to obtain a perfect unity of views and tendencies ; and this end would be impossible, if the divers influences, which must become deeply rooted in the mind of young persons of a certain age, by a residence in a great city like St. Petersburg, were allowed to subsist. It is therefore established as a principle, that none but young men of such an age, as gives the assurance of an entire purity of manners and of an entire facility in yielding themselves to the doctrines taught, can be admitted to the imperial school.

The age of admission is fixed at twelve years. The conditions of intellectual aptitude consist in an acquaintance with the Latin language, and with the most important modern languages, (as the French and German) with history, geography and mathematics.

The pupils of the school (the number of which is fixed at one hundred and fifty) are distributed into six classes, besides a preparatory class, destined to those of the newly admitted pupils, who, though they give the best proofs of capacity, are notwithstanding deficient in some of the prescribed branches of study.

The duration of the course of each class is fixed at one year; so that the complete course of studies lasts six years. The pupils who annually leave the school, after having terminated their course, perform a novitiate of at least six years in judicial practice.

In the preparatory class are taught the Russian, Latin, German and French languages, history, geography, and mathematics. The religious instruction, and the schools of music, of design, and of calligraphy, are frequented by all the classes.

In the sixth class, the studies commenced in the preliminary class are continued, in a more thorough manner, with the addition also of the Greek language.

In the fifth class, besides these different branches of study, the English language, the physical sciences, and natural history, are taught.

A knowledge of all these modern languages is generally acknowledged as necessary to complete the education of a finished jurisconsult; but it is especially indispensable in Russia, where the habits of the higher classes of society have in some sort naturalized all the languages of the globe.

In the fourth class, the study of philosophy and statistics is commenced.

When the school was first established, it was found impossible to organize any more than these four inferior classes, devoted to the preliminary studies; with the third class alone, the study of law was to commence.

But the prince d'Oldenburg desired much to see the pupils of the fourth class initiated in the studies destined to form the object of their career ; and, by his express order, a course of introduction to the study of law was given by the writer of this notice, who was invested with the professorship of the encyclopedia of law. The text of his lectures will be published forthwith.

With this year, therefore, the pupils began to be familiarized with the sources of the Roman law, and Mr. Schneider, counsellor of state, charged with the department of Roman law, explained to them the Institutes of Justinian.

In the third class, the pupils continue the study of foreign languages, history, geography, mathematics, philosophy and statistics ; but they at the same time attend a course of the encyclopedia of law, a course of Roman law, of the history of the Russian law, and a course of political economy. As to the courses of religious instruction and the fine arts, it has already been remarked, that they are frequented by all the classes of the law school.

In the two last classes, the philosophical studies are pursued, but the time devoted to them is naturally more limited ; and historical studies are particularly attended to.

In regard to the special studies of law, instruction is given, in the second class, in the Roman law, and in the following designated parts of the national law, namely : 1, constitutional law and the law of casts ; 2, administrative law (central and provincial authorities) ; 3, civil law ; 4, criminal law. In this class, also, the exercises of practical jurisprudence are commenced.

In the last class, finally, the pupils receive instruction in the law of seignorial jurisdictions, in procedure, in legal medicine, financial law, the law of police, administrative law, the provincial laws of countries incorporated with Russia (for example, the German law), and, lastly, in mathematics applied to law. The principal object of the labors of this last class is judicial practice ; for the young men of this class are to enter immediately upon the exercise of judiciary functions.

The plan of the imperial school is perfectly adapted to the wants of Russia ; but it is not definitively settled, so far at least as to

preclude the introduction of such changes, as experience may show to be useful.

The imperial school, we think, will soon create for itself relations of scientific commerce with learned Europe, and will form a sort of juridical academy, which will receive with zeal the labors submitted to it by foreign jurisconsults.

*Story's Conflict of Laws.* We learn from the *Revue Etrangère et Française*, for March last, that the German translation of this work, which we lately announced as advertised and in preparation, has been abandoned.

*To our Readers.* We have been obliged to make room in the present number, for a general index to the ten volumes of our journal, from the eleventh to the twentieth inclusive, which we partly promised in our last April number. The contents of the present volume, being included in the general index, are not inserted in a separate one.

## QUARTERLY LIST OF NEW PUBLICATIONS.

### FRANCE.

Des ministres dans la monarchie représentative ; par M. *Charles His.* 2e ed. Paris, Delaunay.

[Of ministers in a representative monarchy.]

Questions neuves sur le prêt à usure, les intérêts du prêt, et les décisions romaines du 18 août 1830 ; par M. *A. Blazy.* Paris, Gaume.

[New questions concerning the loan upon usury, interest of the loan, and the Roman decisions of Aug. 18, 1830.]

Loi sur l'administration municipale ; par M. *de Cormenin.* Paris, Dupont.

[Law concerning municipal administration.]

De la juridiction de l'Eglise sur le contrat de mariage, considéré comme matière de sacrement ; par un ancien vicaire-général. 2e ed. Paris.

[Of the jurisdiction of the church concerning the contract of marriage, considered as matter of sacrament.]

Les condamnés et les prisons, ou réforme morale criminelle et pénitentiaire ; par le vicomte *Bretignères de Courteilles.* Paris, Perrotin, Tessier.

[The convicts and the prisons, or moral, criminal and penitentiary reform.]

De la législation des rails-routes ou chemins de fer en Angleterre et en France ; par M. *Achilles Guillaume.* Première partie. Paris, Carilian-Gœury.

[On the law of railroads in England and in France.]

Éléments du droit français, ou analyse raisonnée de la législation politique, administrative, civile, commerciale, et criminelle de la France ; par M. *Alphonse Grün.* Paris, Hachette.

[Elements of French law, or an analysis of the political, administrative, civil, commercial and criminal legislation of France.]

Observations sur les sociétés en commandite par actions. Paris, Ledoyen.

[Observations on limited partnerships in shares.]

Répertoire théorique et pratique du droit commercial ; par M. *L. Giraudeau*. Première partie. (A.—Com.) Paris, Renard.

[Theoretical and practical repertory of commercial law.]

Journal des lois, publication mensuelle formant collection complète des lois et ordonnances, etc. Redacteurs en chef, M M. *Franque* et *Delattre*. Première livraison, 10 décembre, 1837, Paris.

[Monthly journal of laws.]

Traité des successions, ou commentaire du titre 1, livre 3, du code civil ; par M. *Poujol*, président de chambre à la cour royale de Colmar, auteur du traité des Donations et Testaments. Colmar, Reiffinger ; Paris, Videcoq.

[A Treatise on Successions.]

Ecole des condamnés ; par M. *Marquet-Vasselot*. 2 vol. in 8o. Paris, Joubert.

[School of the condemned.]

Philosophie du système pénitentiaire ; par M. *P. A. Marquet-Vasselot*. Paris, Joubert.

[Philosophy of the penitentiary system.]

Théorie des garanties constitutionnelles ; par M. *A. Cherbuliez*. 2 vol. in 8o. Paris, Cherbuliez.

[Theory of constitutional guarantees.]

Traduction des titres vi. et vii. des fragments d'Ulpian et des titres des pandectes *De Jure dotium et de donationibus inter virum et uxorem*, avec des notes abondantes ; par un avocat, auditeur du cours des pandectes. Paris, Fromont-Pernet.

[A translation of the titles vi. and vii. of the fragments of Ulpian, and of the titles of the pandects *de jure*, etc.]

Le Censeur. Revue législative, consacrée principalement à l'examen et la discussion des projets de lois soumis aux délibérations de la chambre des Pairs et de la chambre des Députés ; par M. *B. J. Legat*. (Prospectus).

[The Censor. A legislative review devoted principally to an examination and discussion of the projects of laws submitted to the deliberations of the chamber of peers and of the chamber of deputies.]

Le Consultant. Journal de droit usuel et de jurisprudence commerciale et industrielle. Paris.

[The Counsellor. A journal of ordinary law and of commercial and industrial jurisprudence.]

Echo des tribunaux de commerce et des sociétés commerciales, numero specimen, fevrier, 1838. Paris.

[Echo of the tribunals of commerce and of commercial partnerships. Specimen number.]

Des sociétés par actions ; par M. *Wolowski*. Paris.

[Of joint stock companies.]

Manuel du procureur du roi et du substitut ; par M. *Massabieu*, procureur du roi à Quimperlé. Paris, Roret.

[Manual of the king's attorney.]

Simple exposé sur les sociétés en commandite, à propos du projet de loi présenté aux chambres le 15 fevrier 1838 ; par M. *Pance*. Paris, Guillaumin.

[A simple exposition of limited partnerships.]

Examen sur le droit romain, selon les Institutes de Justinien, présenté par demandes et réponses, &c ; par un docteur en droit. Paris, Fromont-Pernet.

[An examination on the Roman law, according to the Institutes of Justinian, by questions and answers.]

Commentaire sur la charte constitutionnelle. Paris, Videcoq, Langlois et Delaunay.

[Commentary on the constitutional charter.]

Traité de la saisie-arrêt ; par M. *F. Roger*, avocat à la cour royale de Paris. Paris, Delamotte.

[The *saisie-arrêt* answers to the foreign attachment of the English and American law.]

Précis de l'histoire du droit civil en France ; par M. *Poncelet*, professeur à la faculté de droit de Paris. Paris, Joubert.

[A summary of the history of civil law in France.]

Traité de législation et de jurisprudence, suivant l'ordre du code civil ; par M. *Hennequin*, avocat à la cour royale de Paris. Paris, Videcoq.

[A treatise on legislation and jurisprudence according to the order of the civil code.]

Theorie de l'emprisonnement, ses principes, ses moyens, et ses conditions d'application ; par M. *Charles Lucas*, inspecteur-général des prisons, membre de l'institut. Tomes II et III. Paris, Legrand et Descaurier.

[The theory of imprisonment, its principles, its means, and its conditions of application.]

Manuel des Prisons, ou Exposé historique, théorique et pratique du système pénitentiaire ; par M. *Grellet-Wammy*. Genève.

## BELGIUM.

Des progrès et de l'état actuel de la réforme pénitentiaire et des institutions préventives aux Etats-Unis, en France, en Suisse, en Angleterre et en Belgique ; appendice général aux ouvrages les

plus récents sur la réforme des prisons, et particulièrement à l'ouvrage de M M. G. de Beaumont et A. de Tocqueville, sur le système pénitentiaire aux Etats-Unis ; par Ed. Ducpétiaux, inspecteur-général des prisons et des établissements de bienfaisance en Belgique. 3 vol. in 18. Bruxelles, société belge de librairie, 1838.

[On the progress and present state of the penitentiary reform and preventive institutions in the United States, in France, Switzerland, England and Belgium ; a general appendix to the most recent works on the reform of prisons, and particularly to that of Messrs. de Beaumont and de Tocqueville, on the penitentiary systems of the United States.]

Manuel de droit romain, contenant la théorie des Institutes, etc ; par F. Mackeldy, traduit de l'allemand, par M. Jules Beving, avocat à Bruxelles. Bruxelles.

[A Manual of the Roman Law, containing the theory of the Institutes, &c.]

Codes militaires en vigueur en Belgique. Annotés des arrêts, etc., précédés d'un traité sur la justice et le droit pénal milit. en Belgique, en France, en Angleterre, etc., par Dr. Ad. Bosch. Liv. 8—12. Bruxelles.

[Military codes in force in Belgium, with notes of decisions, &c, preceded by a treatise on military penal law and justice, in Belgium, France, England, &c.]

## GERMANY.

*Albrecht, Dr. J. A. M.*, die Ausbildung des Eventual-princips im gemeinen civilprocess. Marburg, Elwert.

Archiv merkwürdiger Rechtsfälle und Entscheidungen der Rheinhessischen Gerichte, mit vergleichender Berücksichtigung der Jurisprudenz von Frankreich, Rheinbayern, und Rheinpreussen. Herausgegeben durch die Anwälte-Kammer in Mainz. Neue Folge. 1r Bd. 4 Hefte. Mainz, Zabern.

[Archives of remarkable cases and decisions of the Rhine-Hessian courts, with references to the jurisprudence of France, Rhine-Bavaria, and Rhine-Prussia.]

*Barth, H.*, breve totius jurisprudentiæ examinatorium. Lipsiæ, Polet.

Beiträge zur Kenntniss des Rechts der freien Hansestadt Bremen. Herausgeg. von Dr. H. D. Watermeyer, und Dr. K. Th. Oelrichs. 1r Bd. Bremen, Geisler.

[Contributions to a knowledge of the law of the free Hanse-town of Bremen.]

*Bentham, Jer.*, Theorie des gerichtlichen Beweises. Aus dem Franz. des Et. Dumont. 2 Thle. Berlin, Ende.

[Bentham's Theory of Judicial Proof, translated from the French of Dumont.]

*Bischoff, Dr.*, Merkwürdige Criminal-Rechtsfälle für Richter, Gerichtsärzte, Psychologen, etc. 3 Bd. Hannover, Hahn.

[Remarkable cases of criminal law for judges, physicians, psychologists, etc.]

*Böhmer, Dr. G. W.*, über die authentischen Ausgaben der Carolina. 2e Auflage. Göttingen, Vandenhöck und Ruprecht.

[On the authentic editions of the Carolina.]

Civilstandes-Gesetze, die, in der Königl. Preuss. Rheinprovinz, zusammengestellt von *F. Philippi*. Erefeld, Funke.

[The laws regulating the civil state in the royal Prussian Rhine provinces.]

Corpus Juris Rom. Ante-Justiniane. Consilio Proff. E. Böckingii et A. Bethmann-Holwegii, etc. Fasc. II. Cod. Gregor., Hermogen., et Theodosian. etc. Cur. G. Haenel. Bonn, Marcus.

*Debes, Dr. Ans.*, Aussätze aus dem Gebiete des Bayr. bürgerlichen, peinlichen und öffentlichen Rechts, Würzburg, Etlinger.

[Essays on subjects of the Bavarian civil, penal, and public law.]

*Dieck, Dr. C. H.*, die Gewissensehe, Legitimation durch nachfolgende Ehe und Misheirath, nach ihren Wirkungen auf die Folgesfähigkeit der Kinder in Lehen und Fideicommissen, unter Berücksichtigung des Bentinck'schen Rechtstreites. Halle, Anton.

[On legitimation by subsequent marriage, &c. with reference to the capacity of the children to succeed in certain cases.]

*Dirksen, H. Ed.*, manuale latinitatis fontium juris civilis Romanorum. Fasc. III. Berlin, Duncker und Humblot.

*Ehrmann, J. P. L.*, Beiträge zur Lehre des Prozess-Rechts in den deutschen Bundesstaaten, insbesondere über nothwendige Schiedsgerichte, etc. Mannheim, Hoff.

[Contributions to the doctrine of process in the German confederacy.]

*Fabricius, Dr. E. F.*, historische Forschungen im Gebiete des Römischen Privatrechts. 1s Heft: Ursprung und Entwicklung der Bonorum Possessio, etc., Berlin, Reimer.

[Historical investigations in the department of Roman private law. No. 1. On the origin and development of the *bonorum possessio*, &c.]

Gaji institutionum commentarii IV. Ad. exempl. a J. F. L. Goeschen editum recogniti et emend. Bonnæ, Marcus.

*Geib, Dr. Gust.*, de confessionis effectu in processu criminali Romanor. observationes aliquot. Turici, Orell, Füssli et Comp.

*Gruner, Dr. G. S.*, über die succession der Weiber in den Osnabrück. Lehen und einige dabei vorkommende Streitfragen. Osnabrück, Rackhorst.

[On the succession of females in the feudal estates of Osnabrück.]

*Hintze, F. W.*, Anleitung zur Mecklenburg. Civilprozess-praxis. Wismar, Schmidt u. v. Cossell.

[Introduction to the practice of the Mecklenburg Civil Process.]

Hypothekenordnung, allgemeine, für die gesammten Königl. Preussischen Staaten, &c. herausgeg. von *C. Paul*, 1r Bd. Leipzig.

[General ordinance concerning hypothecations for the royal Prussian states.]

Jus criminale speculorum Saxonici et Suevici. Adumbr. D. C. Fr. Hæberlin. Lipsiæ, Weigel.

*Kammerer, Dr. Fd.*, Untersuchung der Frage: Ob nach Justinianeischen Recht die Professoren der Jurisprudenz ein Honorar zu fordern berechtigt gewesen? Güstrow, Opitz.

[On the question, whether, according to the Justinianean law, the professors of jurisprudence were entitled to demand an *honorarium*?]

*Knapp, H.*, Erörterungen über den Entwurf eines Strafgesetzbuches für das Königreich Würtemberg, vom Jahre 1835. 2 Abthlgn. Stuttgart, Metzler.

[Discussion of the project of a criminal code for the kingdom of Wurtemberg, of the year 1835.]

Landrecht, allgemeines, für die Preuss. Staaten. In Verbindung mit den ergänzenden Verordnungen herausgeg. von *A. J. Mannkopf*, 3r Bd. enth. Thl. II. Berlin, Nauck.

[General land law (code) for the Prussian states, in connection with the supplementary ordinances.]

*Lang, Prof. Dr. J. J.*, Lehrbuch des Justinianeischen Römischen Rechts, zum Gebrauche bei Vorlesungen. 2e verb. Ausg. Stuttgart, Cotta.

[Compendium of the Roman law of Justinian for the use of lectures.]

Lexicon literaturæ academ. juridicæ, quo tituli dissertationum, etc. ab academ. initiis usque ad a. 1835, editorum alphabet. ord. continentur. Cum præfat. *Dr. E. T. Vogel*. Tom. II. fasc. 1-3. Lipsiæ, Goethe.

*Mayer, Prof. Dr. M. S.*, das Intestaterrecht der liberi naturales, nachdem heutigen Römischen Rechte. Tübingen, Fues.

[The right of succession *ab intestato* of natural children, according to the Roman law now in use.]

*Mayerfeld, Dr. Fz. W. L. v.*, die Lehre von den Schenkungen, nach Römischen Rechte. 2r Bd. 1e Abthl. Marburg, Elwert.

[The doctrine of donations according to the Roman law.]

*Mittermaier, Prof. Dr. C. J. A.*, Grundsätze des gemeinen Deutschen Privatrechts, mit Einschluss des Handels-Wechsel-und Seerechts. 2 Abthlgn. 5e Ausg. Regensburg, Manz.

[Principles of the common German private law, including maritime and commercial law, and the law of exchange.]

*Puchta, Prof. Dr. G. F.*, das Gewonheitsrecht 2r. Thl. Erlangen, Palm.

[The customary law.]

— Lehrbuch der Pandekten. Leipzig, Barth.

[Compendium of the Pandects.]

*Richelmann, Dr. H.*, der Einfluss des Irrthums auf Verträge. Ein civilistischer Versuch. Hannover, Helwing.

[The influence of error upon contracts.]

*Rüttiman, J.*, über die Englische Strafrechtspflege. Amtlicher Bericht an d. Züricher Gesetzes-Revisions-Commission. Zürich, Hoffman.

[On the administration of the criminal law in England:—an official report made to the commission for revising the law in Zurich.]

Sammlung der im Grossherzogthum Baden in Bezug auf die Israeliten erschienenen Gesetze und Verordnungen. In chronolog. Folge. Carlsruhe, Müller.

[Collection of the laws and ordinances of the grand duchy of Baden, concerning the Jews, in chronological order.]

*Schilling, Dr. F. Ad.*, Lehrbuch der Institutionen und Geschichte des Römischen Privatrechts. 2r Bd. Leipzig, Barth.

[Compendium of the institutes and history of the Roman private law.]

*Schneider, Dr. K. A.*, das alt civile und Justinianeische Anwachsungsrecht bei Legaten, &c. Eine Revision dieser Lehren. Berlin, Natorff und Co.

*Schneider, Dr. Rob.*, index omnium rerum et sententiarum, quæ in corpore juris Justinianei continentur, verborum ordine observato. Vol. I. fasc. 1. Lipsiæ, Focke.

*Seuffert, Dr. J. Ad.*, gesammelte rechtswissenschaftliche Abhandlungen. Erlangen, Palm und Enke.

[Dissertations on jurisprudence.]

*Walter, Prof. Dr. F.*, Geschichte des Römischen Rechts bis auf Justinian. 2e Liefrg. Vog. 28—41. Bonn, Weber.

[History of the Roman law to the time of Justinian.]

Whistspieler, der falsche, oder Injurienklage des Lord de Ros gegen J. Cumming, etc. Aus dem Engl. von C. Rakenius. Hamburg, Hoffman & Campe.

[The false whist-player, or the process of the lord de Ros, against J. Cumming, etc., translated from the English.]

*Wirsching, Dr. H.*, Darstellung der Entstehung, Ausbildung, und des jetzigen rechtlichen Zustandes der Patrimonial-Gerichtsbarkeit in Baiern. Preisschrift. München, Weber.

[An account of the origin, development, and present legal condition of the patrimonial jurisdiction, in Bavaria.]

*Zacharia, Prof. Dr. K. S.*, Handbuch des Franzosischen Civil-rechts. 4 Bde. 4e Aufl. Heidelberg, Mohr.

[Manual of the civil law of France.]

*Fischer, Prof. Fr.*, über den gegenwärtigen Stand des Natur-rechts, nebst Winken zu seiner Weiterbildung. Basel, Neukirch.

[On the present condition of natural law, together with hints to its further development.]

Mittheilungen aus dem Leben eines Advocaten. Herausgegeben von *Dr. Ed. Baurmann*. Frankfurt, Kühler.

[Passages in the life of an advocate.]

*Mittermaier, Dr. C. J. A.*, Dissertatio : de principio imputa-tionis alienationum mentis in jure criminali recte constituendo. Heidelbergæ, Mohr.

Die Wissenschaft der Römischen Rechts-geschichte von *Dr. J. Christiansen*. Altona, Hammerich.

[The science of Roman legal history.]

#### UNITED STATES.

An Abridgment of the Law of Nisi Prius, by *P. Brady Leigh*, Esq., Barrister at Law. With notes, &c. by *George Sharswood*, Esq., of the Philadelphia Bar. Philadelphia : Nicklin & Johnson.

[See page 452.]

A Treatise on the Practice of the Court of Chancery, with an Appendix of Forms, &c. By *John Sidney Smith*, of the Six Clerks' Office. With notes and references to American decisions, by *David Graham*, Counsellor at Law. Philadelphia : Nicklin & Johnson.

[We shall notice this work in our next number.]

Civil Code of the State of Louisiana ; with Annotations by *Wheelock S. Upton*, L. L. B., and *Needler R. Jennings*. New Orleans : E. Johns & Co.

[See page 459.]

A Digest of Cases determined in the Admiralty Courts of the United States and in the High Court of Admiralty in England ; together with the substance of some of the works of Sir Leoline Jenkins, Judge of the Admiralty, in the reign of Charles II. By *George T. Curtis*, Esq., of the Suffolk Bar. Boston : Charles C. Little and James Brown.

[We shall notice this work, which has been received with favor by the pro-fession, in our next number.]

A Summary of Practice in Instance, Revenue and Prize Causes, in the Admiralty Courts of the United States, for the Southern District of New York ; and also on appeal to the Supreme Court :

together with the Rules of the District Court. By *Samuel R. Betts*, Judge of the District Court. New York: Halsted and Voorhies.

[To be noticed in our next number.]

Reports of Cases argued and adjudged in the Superior Court and Court of Errors and Appeals of the State of Delaware, from the organization of those Courts under the Constitution; with references to some of the earlier cases. Published at the request of the General Assembly. By *Samuel M. Harrington*, one of the Judges of the said Courts. Vol. I. Dover: A. M. Schee.

Reports of Cases argued and determined in the Court of Appeals of Maryland. By *Richard W. Gill*, clerk of the court of appeals, and *John Johnson*, Attorney at Law. Vol. VII. containing cases in 1834-35-36. Baltimore: W. & J. Neal.

Reports of Cases argued and determined in the Supreme Judicial Court of Massachusetts. By *Octavius Pickering*, Counselor at Law. Vol. XVII. Boston: Charles C. Little & James Brown.

The Law Library, edited by *Thomas J. Wharton*, Esq., and published by John S. Littell, Philadelphia. Nos. 64 & 65, containing Powell on Devises, edited by Jarman, concluded.

Elements of Medical Jurisprudence, by *T. R. Beck*, M. D., and *J. B. Beck*, M. D. Sixth edition. New York; Thomas, Cowperthwaite & Co.

The most important parts of Blackstone's Commentaries, reduced to questions and answers. By *Asa Kinne*, Esq. New York.

#### ENGLAND.

A Treatise on the Law of Evidence. Eighth edition, with considerable additions. By *S. March Phillips*, Esq., and *Andrew Amos*, Esq., Barrister at Law. In two volumes, 8vo.

An Abridgment of the Law of Nisi Prius, together with the General Principles of Law applicable to the Civil Relation of Persons, and the Subject Matters of Legal Contention. By *S. B. Harrison*, Esq., and *F. Edwards*, Esq., Barristers at Law. Two volumes.

Parliamentary Practice on passing private bills through the House of Commons, and the preliminary measures of the House of Lords, with Precedents &c. By *B. Lumley*, Solicitor and Parliamentary Agent. 8vo.

A Treatise on the Practice of the High Court of Chancery, with some practical observations on the Pleadings in that Court.

By *Edmund Robert Daniell*, F. R. S., Barrister at Law. Vol. 2. Part 1.

The Tithe Act and the Tithe Amendment Act, with notes, &c. By *G. H. Whalley*, of the Tithe Commission Office. 12mo.

Concise Forms of Wills, with Practical Notes. By *W. Hayes* and *T. Jarman*, Barristers at Law. 2d ed. 12mo.

The Law and Practice in Bankruptcy &c. By *Francis Gregg*, Esq., Barrister at Law. 12mo.

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The acts for the Commutation of Tithes in England and Wales, &c. By *J. T. Schomberg*, Esq., Barrister at Law, 2d. ed. 12mo.

Decisions of the Courts at Westminster, to Trinity Term, 1838, on the New Rules of Pleading, and upon evidence as modified by those rules, &c. By *W. Ramsberg*, Esq., Barrister at Law. 12mo.

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#### IN PRESS.

Commentaries on Equity Jurisprudence. By *Joseph Story*. 2d edition. Boston : Charles C. Little & James Brown.

A Digest or Abridgment of the American Law of Real Property. By *Francis Hilliard*. Vol. II. Same.

Treatises on Contracts, translated from the French of *R. J. Pothier*. By *L. S. Cushing*. Vol. I, containing the Contract of Sale. Same.

Ball and Beatty's Irish Chancery Reports. 2 volumes. Philadelphia : R. H. Small.

Eden's Chancery Reports, during the time of Lord Chancellor Northington. 2 volumes. Same.

Pothier on Obligations, translated from the French by Sir *W. D. Evans*. 2d Am. ed. Same.

The Writings of John Marshall, late chief justice of the United States, upon the Federal Constitution : being the opinions of the Supreme Court of the United States, delivered by him upon points

of law arising under that Constitution. With an Appendix containing the opinions upon like points, delivered in that court, by other judges, prior to the death of chief justice Marshall. 1 volume. Boston : James Munroe & Co.

*Phillips's Law of Evidence*, with notes by *Esek Cowen*. New York : Gould and Banks.

#### IN PREPARATION.

A Digest of the Massachusetts Reports and the first sixteen volumes of Pickering's Reports. By *J. C. Perkins* and *J. H. Ward*, Esquires.

Commentaries on Commercial and Maritime Jurisprudence, by *Joseph Story*. Vol. I. Agency and Partnership.

Manual of Political Ethics. Part II, by *Francis Lieber* : and Political and Legal Hermeneutics, by the same.

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*Errata*. The writer of the article in our last number, on *Rules of Evidence*, has furnished us with corrections of the following errors in the same as printed :

- Page 76, 19th line from top, after "heard," insert "by himself."
- " 77, 8th " " " after "where," insert "the."
- " 78, in the last line of note, for "concession," read "confession."
- " 80, 17th line from top, for "by," read "for."
- " 86, 17th " " " for "characteristics," read "characteristic."
- " 87, 17th line from bottom, for "confessions, excluding the one and receiving the other," read, "motives, excluding in the one, and receiving in the other."
- " 87, 13th line from bottom, for "then," read "there."
- " 91, 3d " " " for "internal," read "mental."
- " 92, 11th " " " (note) for "exhausted," read "extorted."











